LAW ASSOCIATION PHILADELPHIA

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1118.

THOMAS THOMPSON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

INDEX.

	Original.	Print.
Caption	*a*	1
Indictment	1	1
Arraignment and plea	2½	2
Order denying motion for continuance	2½	2
Order allowing application for witnesses at public expense	2½	2
Order for attachment for Sarah Haynes *et al*	2¾	2
Order for continuance	2¾	2
Order calling jury and beginning trial	3	3
Order discharging jury, etc	4	3
Order filing plea of former jeopardy, etc	5	4
Order for marshal to summon talesmen	5	4
Order granting leave to withdraw motion	5	4
Order filing motion to summon jury from body of district	5	4
Order calling jury and beginning trial	6	4
Order continuing trial	7	5
Verdict	8	6
Order filing motion for new trial	8½	6
Order overruling motions for new trial and in arrest of judgment	9	7
Judgment and sentence	10	7
Order granting time to file bill of exceptions	11	8
Order allowing bill of exceptions	12	8
Order filing petition for writ of error	12	8
Order staying execution and directing that the whole of the evidence and charge of the court be put in the bill of exceptions	13	8

	Original.	Print.
Bill of exceptions	14	8
Proceedings discharging first jury	14	8
Plea of former jeopardy	15	9
Motion for a jury from the body of the district	18	11
List of jurors and certificates of clerk and marshal	21	13
Motion to quash panel	23	14
Evidence for the Government before first jury	24	15
Testimony of Jacob Hermes	25	15
Statement of court as to disqualification of a juror, etc	33	20
Examination of jurors, etc	40	23
Evidence for the Government before second jury	62	35
Testimony of Jacob Hermes	62	35
George Hermes	89	52
Dr. George W. Bell	100	60
Government rests	104	63
Evidence for defendant	105	63
Testimony of Sarah J. Haynes	106	63
Joe Haynes	119	71
Willie Haynes	122	72
Lizzie Checotah	125	74
Amos Gray	127	75
Joe Haynes (recalled)	131	78
Willie Haynes (recalled)	132	78
William Baxter	133	78
James Gregory	138	81
Sam. J. Haynes	143	84
Sam. Checotah	152	89
Thomas Thompson (defendant)	154	90
Defense rests	171	102
Evidence for the Government in rebuttal	175	102
Testimony of Dr. George W. Bell	176	102
Jacob Hermes	182	106
Evidence closed	183	106
Charge to the jury	184	106
Exceptions to charge	244	135
Verdict	246	136
Motion for new trial	247	136
Opinion on motion for new trial	260	144
Motion in arrest of judgment	272	149
Judge's certificate	273	150
Assignment of errors	274	150
Petition for writ of error	291	158
Petition and affidavit to prosecute as pauper	292	158
Writ of error	293	159
Citation	294	159
Clerk's certificate	295	160

UNITED STATES OF AMERICA, *Western District of Arkansas:*

Pleas and proceedings before Hon. I. C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court, case of—

UNITED STATES
vs.
THOMAS THOMPSON. } Indictment for murder.

1 *Indictment.*

United States of America, western district of Arkansas. In the circuit court, August term, A. D. 1893.

UNITED STATES
vs.
THOMAS THOMPSON. } Murder.

The grand jurors of the United States of America, duly selected, empaneled, and sworn and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Thomas Thompson, on the 8th day of June, A. D. 1893, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Charles Hermes, a white man and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Thomas Thompson, with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he, the said Thomas Thompson, in his hands then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said Charles Hermes, and that the said Thomas Thompson, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said Thomas Thompson discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said Charles Hermes, in and upon the left side of the breast of him, the said Charles Hermes, giving to him, the said Charles Hermes, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said Thomas Thompson, in and upon the left side of the breast of him, the said
2 Charles Hermes, one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he, the said Charles Hermes, then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Thomas Thompson, him, the said Charles Hermes, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 75. United States vs. Thomas Thompson. Murder. A true bill. I. W. Bruce, foreman.

21354——1

Witnesses.

Jacob Hermes, 3 miles n. w. Oakmulgee, I. T.; George Hermes, 3 miles n. w. Oakmulgee, I. T.; James Adkins, Fort Smith, Ark.; Miles Sorrell, Okmulgee, I. T.; Louisa Thompson, Okmulgee, I. T.; Daniel Watson, Okmulgee, I. T.; Dr. George Bill, Okmulgee, I. T.

Filed in open court, Aug. 8th, 1893. S. Wheeler, clerk. By I. M. Dodge, D. C.

2½ *Record entries.*

In the circuit court of the United States for the western district of Arkansas, Aug. term, 1893.

TUESDAY MORNING, 8½ O'CLOCK, *Aug. 9th*, 1893.

Court met pursuant to adjournment. Present, the Hon. Isaac I. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* THOMAS THOMPSON. } Indictment for murder, No. 75.

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come *te* the said defendant in custody of the marshal, and by his attorney, and having had hearing of said indictment, and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

Whereupon, by agreement of parties, this cause was set down for trial October 23rd, 1893.

MONDAY, *Oct. 2nd*, 1893.

(Caption omitted.)

On this day come the said defendant, by his attorneys, and files his motion for a continuance in this cause.

Said motion coming on to be heard, and the court, being well and *and* sufficiently advised in the premises, doth overrule said motion.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application for witnesses at the expense of the United States. Said application coming on to be heard and the court, being fully advised in the premises, doth allow the same.

2¾ It is therefore ordered that the legal expense of procuring the testimony of Sarah Haynes, Joseph Haynes, Willie Haynes, Lizzie Checota, Sam Checotah, Saml. J. Haynes, Amos Gray, one Roman, Wm. Baxter, and Jim Gregory, in behalf of said defendant, be paid by the United States, and that a subpœna be issued for them returnable October 23rd, 1893.

MONDAY, *Oct.* 23*rd*, 1893.

(Caption omitted.)

On this day, on motion of the said defendant by his attorney, it is ordered by the court that an attachment be issued for Sarah Haynes, Joseph Haynes, Millie Haynes, Lizzie Checotah, Sam Checotah, Samuel J. Haynes, Amos Gray, Roman, William Baxter, and Jim Gregory, returnable forthwith, to answer for their contempt in failing to appear as witnesses in this cause when duly summoned thereto.

FRIDAY, *Oct.* 27, 1893.

(Caption omitted.)

On this day, by agreement of parties, it is ordered by the court that this cause be, and the same is hereby, continued to the next term of this court, and set down for trial Nov. 21, 1893.

3 In the circuit court of the United States for the western district of Arkansas, Nov. term, 1893.

THURSDAY MORNING, 8½ O'CLOCK, *November* 23*rd*, 1893.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* THOMAS THOMPSON. } Indictment for murder, No. 75.

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorneys, Messrs. Barnes & Mellette, and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors, as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore, and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff, by his attorney, ordered by the court that a jury come to try the issues joined. Whereupon, after counsel for both plaintiff and defendant had exercised in the presence of defendant their full right of challenge under the law, the following were selected for the trial of this cause, to wit:

Nathaniel B. Dearmore,	Geo. S. Ricketts,	Frank P. Willis,
Saml. S. Delaney,	John B. Pettigrew,	Jas. A. Johnson,
James S. Gray,	James Sloan,	Geo. R. Williams,
Alex. McMartin,	Robt. M. Stephens,	Wm. R. Graham,

4 twelve good and lawful men of the district aforesaid, duly selected, empan'leed, and sworn to try the issue joined and a true verdict render according to the law and the evidence.

Whereupon it was ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

It having come to the knowledge of the court, after the empaneling of the jury, the statement of the case, and the introduction of one witness that one of the jurors, Jas. A. Johnson, is disqualified to sit in the case, on account of having been a member of the grand jury that returned the indictment in this case, and having heard all the evidence introduced by the Government before said grand jury;

And the said juror, Jas. A. Johnson, having been fully examined, upon his voire dire and answered all questions in such a manner as to qualify him to sit upon the jury in this trial, at the time not recognizing the fact that he had been a member of the grand jury that found the indictment herein and remaining in ignorance of that fact until after the statement of the case and the first witness had been called and partly examined, when he discovered such fact and made the same known to the court;

And the defendant being present and, by his counsel, objecting to proceeding further in the trial of this cause with the said juror, on account of his incompetency as aforesaid:

It is therefore ordered that the jury be discharged from the further consideration of the case, and that another jury be called for the trial of said cause, to which action of the court the defendant, by his counsel, at the time excepted.

5 MONDAY, *Nov.* 27, 1893.

(Caption omitted.)

On this day come the said defendant, by his attorneys, Messrs. Barnes & Mellette, and files his plea of former jeopardy, and also files his motion for a jury from the body of the district.

(Caption omitted.)

It appearing from an examination, in the presence of the defendant, of the members of the regular panel of jurors, summoned for and in attendance on the present term of court, that a number are disqualified to try the above-entitled cause, because of opinions formed after having heard part of the evidence in the case, it is hereby ordered that the marshal summon from the bystanders twenty-eight legal voters of the western district of Arkansas, to be used as talesmen in making up a jury for the trial of this cause.

WEDNESDAY, *Nov.* 29, 1893.

(Caption omitted.)

On this day come the said defendant, by his attorney, Wm. M. Mellette, esq., and asks leave to withdraw from the files the motion filed Nov. 27th, 1893, asking for a jury in this cause from the body of the district, which is by the court granted.

Whereupon the defendant, by his attorney aforesaid, files another motion asking for a jury in this cause from the body of this district.

6 FRIDAY, *Dec.* 1*st*, 1893.

(Caption omitted.)

Now comes the defendant, in person and by his attorneys, Barnes & Mellette, and files a motion to quash that part of the panel of jurors consisting of twenty-eight men summoned from bystanders by the marshal by order of court, which motion was by the court overruled. And the petition filed by the defendant on the 29th asking for a jury from the body

of the district, drawn in the regular manner from the jury box by the jury commissioners, is refused. And now come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Thos. H. Barnes & Wm. M. Mellette, esq., and it appearing from the returns of the marshal that the defendant has been served with a duly certified copy of the indictment in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore, and also having been served with a list of the 28 men summoned by the marshal from the bystanders more than two entire days heretofore, and having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff, by its attorney, ordered by the court that a jury come to try the issue joined, and the clerk was directed to begin the call with the regular panel. Whereupon defendant, by his attorney, objects to the 12 men being called who were heretofore empaneled for the trial of this cause on the 27th inst., and the court sustains said objection and orders the clerk to omit in the call the names of said jurors.

7 Whereupon, after counsel for both plaintiff and defendant had exercised, in the presence of the defendant, their full right of challenge under the law, the following qualified jurors were selected for the trial of this cause, to wit:

Ambrose Eubanks,	William Nail,	Frank Reed,
Geo. W. Goodwin,	Salem W. Oliver,	Wm. F. Henderson,
Wm. S. Lively,	John Smith,	Berry Hogue,
John B. Morris,	Robert Walker,	John A. Blackburn,

Twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence.

And, after hearing a statement of the case by counsel, and a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

And it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

SATURDAY, *Dec.* 2, 1893.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal, and by his attorneys, Messrs. Barnes & Mellette; and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

Ambrose Eubanks,	William Nail,	Frank Reed,
Geo. W. Goodwin,	Salem W. Oliver,	Wm. F. Henderson,
Wm. S. Lively,	John Smith,	Berry Hogue,
John B. Morris,	Robert Walker,	John A. Blackburn.

who took their seats in the jury box and, after hearing the remain-
8 der of the evidence and the argument of counsel, and there not being time to further progress in the trial of this cause they were put in charge of the sworn bailiff aforesaid.

MONDAY, *Dec.* 4, 1893.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys Messrs. Barnes & Mellette, and now come the jury heretofore empaneled for the trial of this cause, in charge of a sworn bailiff of this court, to wit:

Ambrose Eubanks,	William Nail,	Frank Reed,
Geo. W. Goodwin,	Salem W. Oliver,	Wm. F. Henderson,
Wm. S. Lively,	John Smith,	Berry Hogue,
John B. Morris,	Robert Walker,	John A. Blackburn.

who took their seats in the jury box, and after receiving the charge of the court, retired in charge of the sworn bailiffs aforesaid, to consider of their verdict, and after some time returned into court the following verdict, to wit:

We, the jury, on the issue raised by the special plea of former jeopardy, upon the facts presented to us as evidence, find the defendant has not by the trial in this case having been heretofore commenced, been put in jeopardy, and we find the issue raised in this case on the special plea of former jeopardy for the United States.

(Signed) JNO. B. MORRIS,
Foreman.

"We, the jury, find the defendant, Thomas Thompson, guilty of murder as charged in the within indictment."

(Signed) JOHN B. MORRIS,
Foreman.

Whereupon, on motion of defendant by his attorneys, the jury was polled, and each juror answered for himself that the verdict as read by the court was his verdict.

Thereupon the jury was by order of court discharged from the further consideration of the case, and the said defendant was remanded to the custody of the marshal to await final sentence, the defendant having by his counsel excepted to the charge of the court in the presence of the jury, and before they retired to consider of their verdict.

8½ JANUARY 2*nd*, 1894.

(Caption omitted.)

On this day the defendant being present in open court, his attorney, William M. Mellette, esq., files *files* a motion for a new trial in this cause.

9 SATURDAY, *January* 13*th*, 1894.

U. S.
vs.
THOMAS THOMPSON. } Indictment for murder, No. 75.

On this day came the said defendant in person and by his attorneys, *and by his attorneys*, Messrs. Barnes & Mellette, and files his motion in arrest of judgment, which was by the court overruled, and the motion heretofore filed, January 2nd, 1894, to set aside the verdict of the jury, and for a new trial in this cause coming on to be heard, and the court being well a*dn* sufficiently advised in the premises, doth overrule said motion.

10 In the circuit court of the United States for the western district of Arkansas. November term, 1893.

SATURDAY MORNING, 9 O'CLOCK, *January* 13*th*, 1894.

Court met pursuant to adjournment. Present, the honorable I. C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES
vs.
THOMAS THOMPSON. } Indictment for murder, No. 75.

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant, Thomas Thompson, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty, heretofore returned against him by the jury in this cause, on the 4th day of December, 1893, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said Thomas Thompson be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said Thomas Thompson to be taken hence, and him, the said Thomas Thompson safely and securely keep, from the date hereof, until Tuesday, the 24 day of April, A. D. 1894, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Thomas Thompson to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Tuesday, the said 24 day of April, in the year of our Lord one thousand eight hundred and ninety-four, cause the said Thomas Thompson to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal, with a full and true account of the execution of the same.

11 SATURDAY, *January 13th*, 1894.

UNITED STATES
vs.
THOMAS THOMPSON. } Indictment for murder, No. 75.

Ordered by the court that counsel for the defendant have until January 16th, 1894, to file their bill of exceptions in this cause.

12 (Caption omitted.)

JANUARY 15th, 1894.

On this day came the said defendant in person and by his attorneys, Messrs. Barnes & Mellette, and tenders his bill of exceptions and asks that the same be signed by the judge and made a part of the record in this cause, which was accordingly done.

(Caption omitted.)

JANUARY 16th, 1894.

On this day come the said defendant in person and by his attorneys, Messrs. Barnes & Mellette, and files his assignment and petition for a writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States.

13 UNITED STATES
vs.
THOMAS THOMPSON. } Indictment for murder, No. 75.

On this day comes the clerk of this court and makes known that a writ of error taking this case to the Supreme Court of the United States has been issued by the said clerk in this cause.

It is therefore hereby ordered by the court that execution of sentence heretofore pronounced in this cause be staid pending the action of the Supreme Court.

Considering the gravity and importance of this case it is ordered that the clerk of this court put the whole of the evidence and charge of the court in the bill of exceptions.

14 *Bill of exceptions.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
THOMAS THOMPSON. } Murder.

Be it remembered that on the 23rd day of November, 1893, the same being a day of the November term of the United States circuit court for

the western district of Arkansas, came on to be heard the above-entitled cause, when the following proceedings were had to wit:

Nathaniel B. Dearmore,	Saml. S. Delaney,	Jas. S. Gray,
Alex. McMartin,	Geo. S. Ricketts,	John B. Pettigrew,
James Sloan,	Robt. M. Stephens,	Frank P. Willis,
Jas. A. Johnston,	Geo. R. Williams,	Wm. R. Graham,

twelve good and lawful men who had answered questions which qualified them to sit as jurors in this case, were duly empaneled, sworn, and charged to try the issues joined in the above-entitled cause. The statement of the case was made by counsel for the Government and defendant respectively. The witnesses for the Government and defendant were duly sworn and put under the rule and Jacob Hermes, a witness for the Government, called and examined in chief. Whereupon the court said: "I understand that Mr. Johnson, one of the jurors in this case, was on the grand jury that found this bill of indictment against this defendant. Is that so, Mr. Johnston?" The juror (Mr. Johnston) said: "I think so, your honor. I did not recognize the name when the jury was made up, but I recognized this witness when he got on the stand—it came to my mind then." Johnston was not asked as to whether he had heard the evidence before said grand jury, or as to whether he had formed or expressed an opinion in the case. And the defendant by his counsel refusing to waive any right that he might have by reason of the said juror James A. Johnston, being a member of the jury trying the case, and objecting and excepting to further proceedings with the present jury, on account of the said Johnston's being a member thereof, moved the court to direct said jury to return a verdict of not guilty, which motion was refused and defendant excepted. Whereupon the court ordered said jury discharged from the further consideration of this case and another jury empaneled; to which order of the court in discharging said jury the defendant then and there excepted. Whereupon the defendant, upon the 27th day of November, 1893, filed his plea of former jeopardy and praying a discharge from custody, which said plea is as follows:

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES, *vs.* THOMAS THOMPSON. } Plea of former jeopardy.

Comes the above-named defendant Thomas Thompson and says that no further proceedings in the premises should be had or taken against him on the indictment herein because he says that on the 23rd day of November, 1893, in this court the said defendant was put upon his trial upon the identical indictment, now pending against him herein, the said court then and there having jurisdiction of the person of defendant, and of the crime of murder, alleged to have been committed in said indictment. That a jury was then and there in due form of law drawn, selected, and empaneled, charged and sworn to well and truly try the said issue as to the guilt or

innocence of defendant under said indictment. That the witnesses
16 upon the part of the plaintiff, the United States of America, and upon the part of the defense were duly sworn and put under the rule. The attorney for the plaintiff presented to said jury the facts which would be given in evidence to establish the allegations of said indictment, and the attorney representing the said defendant presented to said jury the facts which would be given in evidence to establish the innocence of said defendant. That the attorney for the plaintiff then and there produced before said jury as a wit*wit*ness for the plaintiff one Jacob Hermes who had been duly sworn and put under the rule as aforesaid, and who proceeded to relate to said jury certain alleged facts concerning the killing of one Charles Hermes, whom it was alleged in said indictment was murdered by defendant. That the said Jacob Hermes was examined and testified as to said alleged facts for a considerable length of time, to wit, for about the space of one hour, giving in detail the circumstances in regard to the killing of the said Charles Hermes. Whereupon it was announced by the court that James A. Johnston, who had been in due form of law drawn, selected, and empaneled, charged and sworn as a juryman to well and truly try the issue as to the guilt or innocence of this defendant under said indictment as aforesaid, had been a member of the grand jury which had found and presented into this court the said indictment upon which the defendant was then and there being tried, and demanded of defendant's attorneys if they would waive for defendant any rights which defendant might have in case said trial proceeded, and the said attorneys declining so to do, the said court without the consent of defendant ordered that the said jury be discharged from the further consideration of the case before it had rendered a verdict therein, which said order is as follows:

17 "It having come to the knowledge of the court after the empaneling of the jury, the statement of the case, and the introduction of one witness, that one of the jurors, James A. Johnston, is disqualified to sit in the case on account of having been a member of the grand jury that returned the indictment in this case, and having heard all the evidence introduced by the Government before said grand jury, and the said juror, James A. Johnston, having been fully examined upon his voire dire and answered all questions in such a manner as to qualify him to sit upon the jury in this trial, at the time not recognizing the fact that he had been a member of the grand jury that found the indictment herein and remaining in ignorance of that fact until after statement of the case, and the first witness had been called and partially examined, when he discovered such fact and made the same known to the court, and defendant being present and by his attorneys objecting to his further proceeding in the trial of this cause, with the said juror on account of his incompetency aforesaid. It is therefore ordered that the jury be discharged from the further consideration of the case and that another jury be called for the trial of said cause, to which action of the court the defendant excepted."

That the said juror, Jas. A. Johnston, was examined fully as to his competency by the attorney for the plaintiff prior to his being empaneled as such juror, but was not asked as to whether he had been on the said grand jury or not, the said attorneys for defendant declining to ask the said juror any question as to his competency.

And the said defendant says that he has been once in jeopardy upon and for the said charge and offence for which he now stands charged in said indictment and can not by the laws of the land be again tried
18 therefor. Wherefore he prays judgment that he be discharged by this court and dismissed from the premises in said indictment contained.

BARNES & MELLETTE,
Attys. for Deft.

Be it remembered that on the first day of December, 1893, this cause again came on to be heard upon the plea of former jeopardy and plea of not guilty, when the following proceedings were had, to wit:

The motion of defendant for a jury from the body of the district, filed after the discharge of the first jury empaneled for the trial of this case, came on to be heard, which motion is as follows:

In the circuit court of the United States for the western dist. of Arkansas.

UNITED STATES
vs. } Murder.
THOMAS THOMPSON.

Comes the defendant, Thomas Thompson, and states that of the list of jurors served upon him from which are to be selected the jury to try this case, but seventeen are of the regular panel of jurors for the present term of this court, regularly drawn from a box as provided by law, viz, from No. 1 to and including No. 17 on the said list as aforesaid served upon defendant, which said list is as follows, to wit:

1.	Wm. Nail	Ozone	Washington.
2.	Jno. Smith	Boston	Madison.
3.	Wm. J. Weaver	Ft. Smith	Sebastian.
4.	Jno. W. Yoes	Ft. Smith	Sebastian.
5.	Adam Endres	Enterprise	Sebastian.
6.	Ambrose Eubanks	Pauline	Franklin.
7.	Geo. W. Goodwin	Huntington	Sebastian.
8.	Wm. R. Gabbard	Aurora	Madison.
9.	Daniel Harrison	Ft. Smith	Sebastian.
10.	Wm. F. Jones	Stanton	Washington.
19 11.	Wm. S. Lively	Vesta	Franklin.
12.	Jno. B. Morris	Goshen	Washington.
13.	Salem W. Oliver	Potter	Polk.
14.	Robert Spoon	Van Buren	Crawford.
15.	Henry Simpson	Fort Smith	Sebastian.
16.	Joseph Ritter	"	"
17.	Henry Williams	"	"
18.	Robert Walker	"	"
19.	John D. Wilson	"	"
20.	Jerry Washington	"	"
21.	Frank Reed	"	"
22.	Wm. F. Henderson	"	"
23.	Jas. W. Rice	"	"

24.	Wm. S. Birnie	Fort Smith	.....	Sebastian.
25.	Hence Owens	"	.....	"
26.	Jno. R. Wren.....	"	.....	"
27.	Granville Krenshaw.....	"	.....	"
28.	Berry Hogue	"	.....	"
29.	John A. Blackburn	"	.....	"
30.	Henry Dennis...	"	.....	"
31.	Horace E. Gordon	"	.....	"
32.	Wm. Patterson	"	.....	"
33.	John A. Miller.....	"	.....	"
35.	Robt. F. Stegall.....	"	.....	"
36.	Edward C. Reichart.....	"	.....	"
37.	Elmo Caruthers.....	"	.....	"
38.	John Reutzel	"	.....	"
39.	Geo. L. Lewis	"	.....	"
40.	Geo. H. Lyman..	"	.....	"
41.	Geo. Maledon	"	.....	"
42.	Walter Evans.....	"	.....	"
43.	Chas. Ahrens	"	.....	"
44.	Geo. W. Barnes.....	"	.....	"

And that the remaining 28 names on said list, viz, from No. 18 to and including No. 45, the last name on said list, were summoned by the marshal of this district from the bystanders, by order of the court, which said order of the court is as follows:

"United States vs. Thomas Thompson. Ordered by the court that the marshal summon twenty-eight legal voters of the western district of Arkansas, to be used as talesmen in the trial of the above-named case."

That all of said jurors so summoned by said marshal are residents of the city of Fort Smith, Arkansas, in this district. That a large number of the regular panel of jurors for the present term of this court are disqualified for the trial of this case, because of the fact that a jury was empaneled heretofore at the present term of this court in this cause, and a portion of the evidence heard, and not by reason of its notariety throughout the district.

Wherefore defendant prays the court for a jury from the body of the district for the trial of this cause.

BARNES & MELLETTE,
Attys. for Deft.

Which motion the court overruled, to which action of the court the defendant then and there excepted.

Whereupon the clerk called the names of the jurymen from which were to be selected the panel to try this cause, and among said jurors so called were the following-named persons: Wilson G. Gray, Wm. M. Perkins, & Isaac B. Sloan, who were examined as to their qualifications and declared by the court as qualified to sit as jurors in this case; whereupon defendant challenged said jurors for cause, as hereinafter mentioned and set forth. The said jurors were members of the regular panel of jurors for the present term of this court and their names were on the list of jurors served upon defendant at the beginning of this term, and before the first jury in this cause was empaneled. And they were presented to defendant

when the first jury herein was empaneled, and were premptorily challenged by him at that time. And their names were not upon the certified list of jurors last served upon defendant after the first jury empaneled in this cause was discharged, to wit, upon the 27th day of November, 1893, which said list of jurors, certificate of clerk attached and return of marshal, is as follows:

21	1. Wm. Nail	Ozone	Johnson.
	2. Jno. Smith	Boston	Madison.
3.	Wm. J. Weaver	Ft. Smith	Sebastian.
4.	Jno. W. Yoes	Ft. Smith	Sebastian.
5.	Adam Endres	Enterprise	Sebastian.
6.	Ambrose Eubanks	Pauline	Franklin.
7.	Geo. W. Goodwin	Huntington	Sebastian.
8.	Wm. R. Gabbard	Aurora	Madison.
9.	Wm. C. Harrison	Vesta	Franklin.
10.	Daniel Harrison	Ft. Smith	Sebastian.
11.	Wm. F. Jones	Stanton	Washington.
12.	Wm. S. Lively	Vesta	Franklin.
13.	Jno. B. Morris	Goshen	Washington.
14.	Salem W. Oliver	Potter	Polk.
15.	Robert Spoon	Van Buren	Crawford.
16.	Henry Simpson	Fort Smith	Sebastian.
17.	Joseph Ritter	"	"
18.	Henry Williams	"	"
19.	Robert Walker	"	"
20.	John D. Wilson	"	"
21.	Jerry Washington	"	"
22.	Frank Reed	"	"
23.	Wm. F. Henderson	"	"
24.	Jas. W. Rice	"	"
25.	Wm. S. Birnie	"	"
26.	Hence Owens	"	"
27.	Jno. R. Wren	"	"
28.	Granville Krenshaw	"	"
29.	Berry Hogue	"	"
30.	John A. Blackburn	"	"
31.	Henry Dennis	"	"
32.	Horace E. Cordon	"	"
33.	Wm. Patterson	"	"
34.	John A. Miller	"	"
35.	Robt. F. Stegall	"	"
36.	Edward C. Reichart	"	"
37.	John R. McBride	"	"
38.	Elmo Caruthers	"	"
39.	John Reutzel	"	"
40.	Geo. L. Lewis	"	"
41.	Geo. H. Lyman	"	"
42.	Geo. Maledon	"	"
43.	Walter Evans	"	"
44.	Chas. Ahrens	"	"
45.	Geo. W. Barnes	"	"

UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript annexed to this certificate is a true and correct list of jurors duly summoned and in attendance in the case of Thos.
22 Thompson, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court at Fort Smith, in said district, this 27th day of Nov., A. D. 1893.

S. WHEELER, *Clerk,*
By I. M. DODGE, *D. C.*

UNITED STATES MARSHAL'S OFFICE,
WESTERN DISTRICT OF ARKANSAS,
Fort Smith, Ark., Nov. 28th, 1893.

I hereby certify that on the 27th day of November, 1893, at the hour of 5 o'clock & 55 minutes p. m., I duly served the within list of jurors on Thos. Thompson by delivering to him a true copy of same at the United States jail, in the city of Fort Smith, Ark.

G. J. CRUMP,
U. S. Marshal,
By A. M. STOCKTON,
U. S. Deputy.

Which challenge of defendant to said jurors was by the court overruled, to which action of the court the defendant then and there excepted. And the counsel for the Government having exercised such peremptory challenges as he desired upon the jurymen called for the trial of this case, the defendant, among others, peremptorily challenged the said jurors Wilson G. Gray, Wm. M. Perkins, and Isaac B. Sloan. Whereupon the defendant filed a written challenge for cause to twenty-eight jurors whose names were presented for the trial of this cause, which challenge is as follows:

23 In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
THOMAS THOMPSON. } Murder.

Comes the defendant in person and by his attorneys, and comes the jury summoned in this cause, and the said defendant challenges 28 of said jurors for the reason that they are not of the regular panel of jurors for the present term of this court; that they are not from the body of the district, but are all residents of the city of Fort Smith, in said district; that they were not drawn from the box from which names of jurors are usually drawn, but were summoned by the marshal of this district from among the bystanders by order of the court; that the names of the jurors so summoned by the marshal are on the certified copy of the list of

jurors served upon defendant herein on the 27th day of November, from No. 18 to No. 45 of said list, which said list is made a part of this motion.

Wherefore defendant prays that said panel of jurors be quashed as to the said 27 names, so as aforesaid summoned.

THOMAS THOMPSON,
By BARNES & MELLETTE,
His Attorneys.

Which challenge to said jurors was overruled by the court, to which action of the court defendant excepted.

24 Whereupon the twenty-eight jurors so as last aforesaid challenged by defendant the clerk called Henry Williams, Robert Walker, John D. Wilson, Jerry Washington, Frank Reed, James W. Rice, Wm. F. Henderson, Wm S. Birnie, Hence Owens, Jno. R. Wren, Granville Krenshaw, Berry Hogue, and John A. Blackburn, who answered questions which qualified them as jurors to sit in this case, and after the counsel for the Government had exercised such peremptory challenges as he saw fit, the defendant peremptorily challenged Henry Williams, Jerry Washington, Jos. W. Rice, Wm. S. Birnie, Hence Owens, Jno. R. Wren, and Granville Krenshaw, and accepted Robert Walker, Frank Reed, Wm. F. Henderson, Berry Hogue, and Jno. A. Blackburn. This completed the jury for the trial of this case. And the Government, to maintain the issues on its part, produced and examined the following-named witnesses: Jacob Hermes, George Hermes, Dr. Geo. W. Bell, who testified as follows, to wit:

25 JACOB HERMES, having been duly sworn upon behalf of the Government, was examined by the district attorney, Hon. James F. Read, and testified as follows, to wit:

Question. What is your name?
Answer. Jacob Hermes.
Q. Where do you live?
A. Near Okmulgee.
Q. How long have you lived in that country?
A. Three years.
Q. Where did you move from to that place?
A. Kansas City.
Q. Did you know Charles Hermes?
A. Yes, sir.
Q. Who was he?
A. My son.
Q. Was he a white man?
A. Yes, sir.
Q. And not an Indian?
A. No, sir.
Q. Do you know Thomas Thompson?
A. Yes, sir.
Q. Where does he live?
A. Well, I can't tell where he lives. He went from one place to another.

Q. Is that him sitting here?
A. Yes, sir.
Q. How long have you known him?
A. I have known him since last winter.
Q. What aged man was Charles Hermes?
A. 23 years old. He would be 24 years old the 29th of next December of this year (1893).
Q. Did he live with you?
A. Yes, sir.
Q. Was he a married man?
A. No, sir.
Q. What business were you engaged in last June; what occupation did you ?
A. Farming.
Q. Where were you farming?
A. On Sam Haines's place.
Q. Did you rent land from him?
A. Yes, sir.
Q. How much land did you have rented?
26 A. I had between 70 and 75 acres.
Q. Who was working it with you?
A. My two boys.
Q. Thomas Thompson is charged here with killing your son, Charles Hermes; did he kill him?
A. Yes, sir.
Q. When was it?
A. On the 8th of June.
Q. Of what year.
A. This year.
Q. Where was it he killed him?
A. Right in the field.
Q. In the Creek Nation?
A. Yes, sir.
Q. Indian Territory?
A. Yes, sir.
Q. You say your son was a white man and not an Indian?
A. Yes, sir.
Q. Now tell the facts and circumstances connected with it.
A. We were plowing corn in the field, and we went to dinner, and we went out in the field again, and when we got out this boy he lay out on the prairie, and we went in that field for to plow our corn. This boy had a horse with him there, and he laid there, and I thought he was picking dueberries. That is what I said to my boys. So we went on, and went into the field for to plow corn, when we were inside of the field he came outside, right along the side of us, outside the field, we were inside of the field, and he went with us down to our plows, we went to our plows, and hitched our horses to the plows to plow corn, and in a while after that, in an hour or an hour and a half, may be more, I do n't know exactly how long, he came back again. He left us the first time without saying a word, and he left us and came back again, and killed my boy. He came around a brush that is there, and it was about 45 yards from there back, and I

believe I saw him before my boy saw him, and he done some
27 talking there, but what he said I do n't know what it was, I heard he was doing some talking. The other boy was closer to him, and maybe he knows fully what he was talking. His Winchester he had there and he had it his so my boys could not seek it, had it on his right side, and he shot my boy, and he fell, and I saw he turned around and I jumped behind my horse, and then he run off.

Q. What time in the day was that?

A. I suppose it was between 2 and 3 o'clock. I think it was closer to 3 than 2. I could not tell it exactly. I didn't have any watch. I knew the time by the work we done.

Q. Had you seen the defendant that morning?

A. No, sir.

Q. When you first saw him it was when you were going back from dinner?

A. Yes, sir.

Q. Going to the field?

A. Yes, sir.

Q. Did you have any conversation with him?

A. No, sir.

Q. How far was he from you when you first saw him?

A. When I first saw him I suppose he was about 150 yards from me.

Q. Were you going in the direction he was?

A. Yes, sir.

Q. He was behind a bush you say down on the ground?

A. There is a little bush down there, and he was where we could see him.

Q. Was he kneeling down?

A. Yes, sir.

Q. You thought he was picking dueberries?

A. Yes, sir.

Mr. MELLETTE (of counsel for defendant). You are talking about now when he first saw him?

The DISTRICT ATTORNEY. Yes, sir. (To the witness.) Q. Where was his horse?

A. He was right beside him; he was on the right side of the horse.

Q. Did you wait there until he came up there to the field?

28 A. He was there and waited until I came up and went in the gate.

Q. How close was he to the field fence, or to where you went into the gate?

A. Just as close as about 50 yards from the field where we had to go in; I don't know exactly, but about 50 yards, or maybe 60 yards.

Q. How far from the gate?

A. The gate is right on the corner.

Q. About 50 yards from the gate, then?

A. Yes, sir.

Q. When you went in the gate, where was he?

A. When we were in and looked around he was right up at us.

Q. Did he have a gun at that time?

A. No, sir; I did not see any at that time.

Q. What side of the field is the gate on, north, south, east, or west?
A. On the southeast corner.
Q. When you went in the field what direction did you go?
A. We went west.
Q. Down the fence?
A. Yes, sir.
Q. He rode on the outside of the fence, did he?
A. Yes, sir.
Q. How close was he to the fence?
A. Right close; it is a wire fence, and he was right close at the fence.
Q. Was there anything said between you and him?
A. No, sir; not a word.
Q. How far did you go that way?
A. Pretty near a quarter of a mile.
Q. Down to where your plows were?
A. Yes, sir.
Q. What corner of the field were your plows in?
A. On the southwest corner, not quite in the corner; at the corner of our turn.
Q. You rode that distance, him on the outside, you on the
29 inside?
A. We didn't ride; we lead our horses.
Q. You and Charley, the boy that got killed?
A. Yes, sir; and the other boy that is with me.
Q. What is the name of the other boy?
A. George.
Q. How old is he?
A. 17 years old.
Q. When this fellow rode off and left you there, did you hear him say anything or do anything?
A. All he did was to yell a couple of times and then rode off; he rode off as fast as the horse could go.
Q. What direction did he go?
A. West.
Q. How far is it from that field to where Sam Haines lives?
A. I guess that is half a mile.
Q. What direction does he live from the field?
A. East.
Q. How far does Haines live from where the gate was?
A. It is about half a mile, or a little further.
Q. The gate is right down here in the southeast corner, you say?
A. Yes, sir.
Q. Where was he when you first saw him?
A. He was about on a line east from the gate, a little south.
Q. From the fence?
A. From the gate or fence.
Q. When you went in the gate you saw him up near the gate?
A. Yes, sir.
Q. Then you went, you say, in a westerly direction?
A. Yes, sir.
Q. And he followed you down there?

A. Yes, sir.
Q. How far down did he go?
A. Down opposite to where the plows were.
Q. What way were the furrows running?
A. North and south.
30 Q. What was this down here in the southwest corner?
A. That is millet.
Q. You were in the cornfield plowing?
A. Yes, sir.
Q. You were not in the millet?
A. No, sir.
Q. After the shooting, did you see him any more after he rode off?
A. Yes, sir.
Q. Where did you see him?
A. I saw him out on the prairie, when he had another horse. He rode off and went over to Sam Haines and got another horse and rode off.
Q. That was after the shooting?
A. Yes, sir.
Q. I am talking about before the shooting?
A. No, sir.
Q. What direction did he come from here the last time?
A. He came from more southwest.
Q. Come from a southwestern direction?
A. Yes, sir.
Q. Was he riding along the road or through the prairie?
A. No; he came over the prairie.
Q. From the direction of whose house did he come?
A. I do not know; I saw him when he was in about 50 or 60 yards from the field. That is when I saw him. In the field where you are in the corn, you can not see so far.
Q. He was coming from a southwest'rly direction?
A. Yes, sir.
Q. You and your boys were in the field at that time plowing, were you?
A. Yes, sir.
Q. About what part of the field were you in when you saw him?
A. In the west part.
Q. With reference to the way the furrows run?
A. We were going south.
Q. You all were plowing from the north to south?
A. Yes, sir.
31 Q. Which one of your boys was in front?
A. Them two boys was pretty near even.
Q. Which was plowing next to the millet?
A. I was plowing myself there.
Q. Who was next to you?
A. The dead boy.
Q. And then the other boy was in the other furrow?
A. Yes, sir.
Q. Then the dead boy was plowing the middle furrow between you and your other son?
A. Yes, sir.

Q. You say he and your other son was nearly together?

A. Yes, sir.

Q. How far behind were you?

A. About 45 steps; maybe a little more; maybe a little less; I didn't measure it; about that far.

Q. You were going south, then?

A. Yes, sir; I was going south.

Q. Towards the south?

A. Yes, sir.

Q. And you say this defendant came from the southwest?

A. Yes, sir

Q. How far had you gotten from the north string of fence before you saw him?

A. I could not tell you; I was between 6 and 700 yards from the north fence when I saw him first; about that.

Q. Now, he was at the fence when the boys got through to the end of their row, was he?

A. They got there about the same time, I guess.

Q. He rode up as they were making the turn?

A. Yes, sir.

Q. And you say you heard some conversation between him and who?

A. He was talking; I did not hear the boy talking at all; if the boy talked any I could not understand what he said; he done some talking, and the boy straightened up and turned around and looked at him, and then he shot him.

32 Q. You could not distinguish anything that was said?

A. No, sir.

Q. How far was your youngest son from Charley at that time?

A. I saw them measure it off there and it was 25 steps from the boy, right on the other side.

Q. Still in the turn row?

A. Yes, sir.

33 The COURT. I understand that Mr. Johnson, one of the jurors in this case, was on the grand jury that found this bill of indictment against this defendant. Is that so, Mr. Johnson?

The JUROR (Mr. Johnson). I think so, your honor. I did not recognize the name when the jury was made up, but I recognized this witness when he got on the stand—it came to my mind then.

The COURT. If that is insisted on by the gentlemen, there is no way left but for the court to discharge the jury on that ground and commence the trial anew.

A JUROR (Mr. Williams). If the court please, embracing this opportunity, I believe in justice to both parties to the case that I ought to state that I am feeling so nearly sick that I ought to say so. I have had fever all day, and I have been thinking it would subside as we got along, but I find that it is getting worse.

The COURT. We could not discharge you now.

The JUROR (Mr. Williams). You stated you might have to get a new jury.

The COURT. Well, that depends on whether they object to it or not.

The DISTRICT ATTORNEY. This indictment was returned August 8th, 1893; I. W. Bruce was foreman of the grand jury. I think it was a special grand jury.

A JUROR (Mr. Johnson). Yes, sir; I was on that grand jury.

The COURT. If the gentlemen insist on it, why, of course, we will have to discharge the jury and commence anew.

Mr. THOMAS H. BARNES (of counsel for defendant). If the
34 court please, in this matter of course we want to take whatever we would conceive to be the proper legal steps. We think it is our duty to except to proceeding with this jury, and we believe the defendant has been in jeopardy, and we want a verdict.

The COURT. I am satisfied he has not been, as far as that is concerned. There is nothing left, if you insist on the point, but to discharge these gentlemen and begin anew.

The DISTRICT ATTORNEY. I do not believe it would be error to proceed with the case.

The COURT. I don't either, but unfortunately for the cause of criminal justice we here do not determine these things finally.

The DISTRICT ATTORNEY. Has that been determined?

The COURT. The general rule is that parties waive these things, but, then, they may set up they had no means of knowing it, and all that sort of thing, as a pretext. I prefer a trial with a new jury.

The DISTRICT ATTORNEY. Unless your honor is thoroughly satisfied, we might let this matter go over until to-morrow morning, and in the meanwhile investigate it.

The COURT. The principle is very plainly laid down in all the authorities that—

"If, after the trial has commenced, a juror is discovered to have been insufficiently sworn, or to be insane, or not of the panel, or from any other cause incompetent, he may be discharged or the error corrected otherwise without entitling the prisoner to go free. Some state the rule to be that anything discovered in a juror showing him not to be a proper one to sit
35 in the case will work this result. But the better form of the doctrine is that the matter must be such as the defendant can make ground for a new trial if the verdict is against him. That whereof the prosecuting officer alone can complain has been waived, if he knew it, by going to trial; and whenever the circumstances are such that the court will hold such waiver to have been made by him, a discharge of the juror without the prisoner's consent will bar a further jeopardy. If a juror is under some legal incompetency, as where he is an alien, unknown to either party when the cause is opened, his discharge does not prevent a second trial."

The DISTRICT ATTORNEY. My recollection is that that question was raised in Kentucky. The supreme court there is very technical. They got a man on the jury who was an alien, but he was put through the regular course of examination.

The COURT. As far as that is concerned that would be a clear waiver. The defendant is bound to know it. But here is a case of a man who sits in the case as a grand juror and hears the evidence, and of course must have made up his mind. This matter of his getting on this jury was an honest mistake, of course, on his part. He did not recognize the case. But he would not be a competent juror.

The DISTRICT ATTORNEY. I wouldn't recognize the case myself, as far as that is concerned.

The COURT. As a matter of precaution, in all these murder cases a list of the grand jury that found the indictment ought to be before the district attorney at the time the case is taken up.

The DISTRICT ATTORNEY. The only question I would be afraid of would be the question of former jeopardy.

36 The COURT. There is nothing in that.

The DISTRICT ATTORNEY. Not if done at the request of defendant.

The COURT. It is done with the knowledge of the defendant.

The DISTRICT ATTORNEY. Do we understand from counsel for the defendant that the defendant objects to proceeding with this jury?

Mr. THOMAS H. BARNES (of counsel for defendant). That is what we did, and we demand a verdict for our client; we contend that our client is in jeopardy. There is a great deal of law on both sides of this question.

The COURT. It would be a very queer state of case that a man is entitled to go free because by an accident it is discovered afterwards that a juror is incompetent. That would be a very queer law, if there is any such law.

Mr. THOMAS H. BARNES (of counsel for defendant). I believe that there is law that when a defendant is placed before a jury, after a jury is empanelled, that the defendant is in jeopardy.

The COURT. Let the order go in this case, that it was discovered after the jury was empanelled that Mr. James Johnson, one of the panel, was upon the grand jury that found the indictment, and the fact being called to attention of counsel for the defendant, they refused to waive it. It is ordered that the jury be discharged, the defendant objecting to proceed with the jury.

Mr. MELLETT (of counsel for defendant). We except to the jury being discharged and demand a verdict.

The COURT. You object to proceeding any further and demand a verdict?

37 Mr. MELLETTE (of counsel for defendant). Yes, sir.

The COURT. I want to know whether you object to proceeding or consent to proceeding.

Mr. MELLETTE (of counsel for defendant). We simply object to the jury being discharged.

The DISTRICT ATTORNEY. This is not the place to raise the other question.

Mr. THOMAS H. BARNES (of counsel for defendant). Well, that may be.

The COURT. Let the order go as I have directed it.

The ASSISTANT DISTRICT ATTORNEY (Mr. McDonough). If you do not object to proceeding we can go on.

Mr. MELLETTE (of counsel for defendant). We do not consent to proceeding.

The COURT. You do not consent to proceeding except proceedure in the shape of an acquittal?

Mr. THOMAS H. BARNES (of counsel for defendant). We simply say that we have been put in jeopardy.

The COURT. You have no right to say that. The question is whether you waive this right you have of objection.

Mr. MELLETTE (of counsel for defendant). No, sir; we do not waive it.

The ASSISTANT DISTRICT ATTORNEY (Mr. McDonough). Do you object to proceeding with this jury?

The COURT. Let the order go, that it being brought to the attention of counsel for the defendant that Mr. Johnson, one of the jury empanelled in this case was a member of the grand jury who indicted this
38 defendant, and counsel for defendant object to proceeding with this jury for that reason, that it is therefore ordered that the jury be discharged.

Mr. MELLETTE (of counsel for defendant). We want to except to the discharge of the jury.

The COURT. Certainly; that is right.

Mr. MELLETTE (of counsel for defendant). Without a verdict?

The COURT. Yes; you simply except to that.

The ASSISTANT DISTRICT ATTORNEY (Mr. McDonough). They have made no objection to proceeding with this jury. They haven't said so in so many words.

The COURT. I asked them the question and Mr. Mellette said they did.

Mr. MELLETTE (of counsel for defendant). Yes, sir.

The ASSISTANT DISTRICT ATTORNEY (Mr. McDonough). I thought he said he did not consent to it.

Mr. MELLETTE (of counsel for defendant). We object to proceeding with the jury.

The COURT. They object to proceeding further in the trial with this jury. Let that go down distinctly in the record.

The ASSISTANT DISTRICT ATTORNEY (Mr. McDonough). That settles it then.

Mr. MELLETTE (of counsel for defendant). We also except to the jury being discharged, on the ground that the defendant has been put in jeopardy and we are entitled to a verdict. We ask the court to instruct the jury to return a verdict of not guilty.

The COURT. The court refuses to do that.

39 Mr. MELLETTE (of counsel for defendant). We desire to save an exception to the ruling of the court.

The COURT. Yes, sir.

40 THURSDAY MORNING, *December 1st*, 1893. (9 o'clock.)

Mr. MELLETTE (of counsel for defendant). I have a motion in regard to these 25 jurymen who have been summoned in this case which I desire to present to the court. The motion reads as follows:

41 Mr. MELLETTE (of counsel for defendant). I simply object to these 25 jurymen because they are not from the body of the district; and because they are not summoned, as I conceive, as required by law. I do not know whether the district attorney makes any contention as to the facts set up in the motion or not. I simply state in the motion that they were summoned from bystanders by the marshal, and that the court ordered them summoned.

The COURT. Yes, sir; I reckon that is just the way it was.

Mr. MELLETTE (of counsel for defendant). How is that, Mr. McDonough (assistant district attorney); do you concede that?

The ASSISTANT DISTRICT ATTORNEY. We concede nothing, if the court please. The record itself will show, for that matter.

The COURT. I am perfectly willing that the record be amended so as to save any inquiry about that by putting in the word "bystanders." I do not think it is material either way. You may just as well insert that in the order. As a matter of fact they were bystanders. They were the same gentlemen who had been qualified before to try the case in town here, and the list had been served on the defendant, and they happened to be standing here for that reason. That is the truth about it.

Do you want to say anything further on your motion, Mr. Mellette?

Mr. MELLETTE (of counsel for defendant). I want to ask Mr. Dodge, the deputy clerk, a question, if he will be sworn.

The court thereupon swore Mr. I. M. Dodge, deputy clerk, and he was examined by Mr. Mellette, counsel for the defendant, as follows, to wit:

42 Question. The jurymen on that list from 18 to 45, how were they summoned? How were they returned into court? How were they summoned? By whom were they summoned? I will ask you first if they are of the regular panel of jurors for this term of court?

A. It is not the panel that was summoned the first of the term; it is not what is considered the regular panel.

Q. Examined specially for the trial of this case, were they not?

A. Yes, sir.

Q. Do you know how they were summoned?

A. No, sir; I do not think I do, any more than by observation. I noticed Mr. Flemming, the deputy marshal——

The DISTRICT ATTORNEY. They were summoned by Mr. Flemming?

The COURT. Yes; there is no question about that in the world.

Mr. MELLETTE (of counsel for defendant). I just wanted it to be down on the record whether the marshal summoned them and if that is agreed on——

The COURT. Mr. Dodge, I will ask you if the return of the marshal shows the service of the list of gentlemen summoned by him in town served upon the defendant 48 hours before this time?

A. Yes, sir.

Mr. MELLETTE (of counsel for defendant). We admit that.

The COURT. As the matter stands now—I don't know how it may stand subsequently—there is a good deal of an effort upon the part of courts to change the jury law, but as it stands now, as interpreted by the Supreme Court, the summoning of these gentlemen for the purpose of filling up the panel is in exact harmony with the views of the Supreme Court with the law as it stood at the time of the interpretation of that statute.

43 That was in 1888. They had a criminal case before them at that time. Mr. Justice Gray held that "the act of June 30, 1879, chap. 52, section 2, which provides that (unless the judge orders the names of the jurors to be drawn from the boxes used by the State authorities) all jurors, 'including those summoned during the session of the court,' shall be publicly drawn from a box containing not less than three hundred names, placed therein by the clerk and a commissioner appointed for the

purpose—while it expressly repeals certain sections of the Revised Statutes respecting the selection, qualifications, and oath of jurors—does not touch the power of the court, whenever, at the time of forming a jury to try a particular case, the panel of jurors previously summoned according to law is found for any reason to have been exhausted, to call in talesmen from the bystanders to supply the deficiency; and does not, either expressly or by implication, repeal section 804 of the Revised Statutes, by which, 'when, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel."

I have read from the case of Howard V. Lovejoy et al. v. United States, 128 U. S., 389.

This is exactly what we did, as far as this matter of summoning gentlemen from the body of the district is concerned. There is a very large discretion with the courts on that subject. It is not to be contemplated that in an emergency, when the regular panel is exhausted, we are to sit in the courts of the country for days and send all over the district,
44 in each county. The apportioning of jury service over the district is a matter under the express statute of the United States, largely in the discretion of the court. Section 345, Desty's Federal Procedure, section 102, R. S. U. S., reads as follows:

"Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur any unnecessary expense, or unduly to burden the citizens of any part of the district with such service."

That section of the statute has been interpreted in the case of United States v. Stewart, 2nd Curtis. "The part of the district from which jurors may be drawn is in the discretion of the court," on the ground that they are summoned under this other provision of the statute. The court has power to determine from what part of the district they shall come from.

There is one allegation in this motion filed by the defendant of which it is necessary to speak, because we are making up a record here, and that is that these jurors, because of the not'riety of this case, are not qualified to try it. That is the intimation.

Mr. MELLETE (of counsel for defendant). The idea intended to be conveyed is that the case was not of such not'riety as to make it impossible to get jurors from the body of the district.

The COURT. I do not think the motion is well taken, and it will be overruled. Are you ready on the part of the defendant to proceed with the trial of this case?

Mr. MELLETE (of counsel for defendant). Yes, sir.

The COURT. Let us have a jury.

45 Mr. MELLETTE (of counsel for defendant). We desire to save an exception to the ruling of the court on our motion.

The COURT. The court takes notice that Mr. Bachelor is disqualfied as a juror in this case. He has answered, upon being examined in another case, that he has conscientious scruples upon the part of capital punishment such that he does not consider himself qualified to find a verdict when the punishment is death. In empanelling the first jury in this case he was excused on that ground.

The clerk then proceeded to call a jury.

Mr. MELLETTE (of counsel for defendant). If the court please, the clerk is calling over the list of regular panel of jurors. I desire to challenge all those called except such as appeared on the list that was served on the defendant on the 27th of this month.

The COURT. They have been served before.

Mr. MELLETTE (of counsel for defendant). Yes, sir; but they were all called up in court on the morning of the 24th of this month, and they were present, and the court declared them disqualified, and we had no notice——

The COURT. I didn't declare this one called now disqualified. When the other jury were empanelled we asked them questions touching their qualifications, and we pronounced them all, in a general way, qualified.

Mr. MELLETTE (of counsel for defendant). I have that list; but he was starting out with those that were not on that list.

The COURT. Do you object to calling the twelve gentlemen who were on the other case?

46 Mr. MELLETTE (of counsel for defendant). I think they are disqualified. I object to the calling of anyone except those who were served in this list on the defendant.

The COURT. We are not governed by that list. These jurors of the regular panel—every one of them—have been served on this defendant. If you object to calling the twelve that were on the other case——

Mr. MELLETTE (of counsel for defendant). I object to calling them.

The COURT. Why?

Mr. MELLETTE (of counsel for defendant). They are as much disqualified as the grand jurymen who tried this case, and as much so as the member of the grand jury who it was discovered was sitting in this case when it started before. I object to the calling of any jurymen except those that were served on the defendant on the 27th of November, because this was notice to us that the jury would be selected from this panel of jurors.

The COURT. Not necessarily. You are required to take notice that all those were served on you were qualified or might be qualified to serve.

Mr. MELLETTE (of counsel for defendant). We desire to present a challenge to all of these.

The COURT. They will be challenged as their qualifications.

Mr. MELLETTE (of counsel for defendant). We desire to challenge the array, because they were called up in court——

The COURT. Let the record show you are making, Mr. Stenographer, that the counsel for the defendant objected to calling any of the

47 twelve who sat in the other case, and these gentlemen who were on the other panel being objected to by the counsel for the defendant upon the ground that they are disqualified, the court overrules their objection and defendant excepts.

Mr. MELLETTE (of counsel for defendant). I want to state another objection to those twelve men who tried that case. I object to all jurymen being called who were not served on the defendant on the 27th of this last month, on the list I have here, because we had no notice of the fact they were to appear.

The COURT. Did you get service of the whole panel during the term?

Mr. MELLETTE (of counsel for defendant). We got it but we were led to believe there were no other jurymen except these.

The COURT. What led you to believe it?

Mr. MELLETTE (of counsel for defendant). Because they were called in open court and stated they had formed or expressed an opinion.

The COURT. We are not calling anybody but this last list now but if it is necessary, and there are others that have not formed an opinion, we will certainly use them, but we do not think it will be necessary; we are not calling anybody but this last list.

Jurors were then called into the box. Mr. Lafayette Brooks was examined as to his qualifications and stated that he had heard part of the evidence of the witness Hermes when the trial was started before.

Q. (By the district attorney). You heard a part of that evidence?

A. Yes, sir; I heard a part of the evidence of the first witness and I formed an opinion.

48 Mr. MELLETTE (of counsel for defendant). We challenge him for cause.

The COURT. He is disqualified.

Mr. MELLETTE (of counsel for defendant). We desire to challenge him for cause.

The COURT. I have heard your challenge and I have excused him. He is excused because he has formed an opinion.

Mr. MELLETTE (of counsel for defendant). I want to challenge him because we have never been served with him.

The COURT. You have been served; the record shows you have been served with every gentleman serving on this regular panel.

Mr. MELLETTE (of counsel for defendant). I just desire to read this challenge and insert such names——

The DISTRICT ATTORNEY. I suggest we call the jurors up now and let counsel for the defendant make their challenges and the court may pass on them.

The COURT. Yes. What difference does it make to the defendant if the court sustains his objection to the jurors; that is a challenge for cause.

Mr. MELLETTE. Jurymen are being called that we have no notice of. We claim we have had no notice.

The COURT. The record show you have.

Mr. MELLETTE (of counsel for defendant). We claim we have not had service as required by statute. The statute says we shall have service of notice forty-eight hours before trial

The COURT. Suppose it is served a week before?

Mr. MELLETTE (of counsel for defendant). On the 27th of No-

49 vember we were served with this list as the list that would be called to try this case.

The COURT. Your argument, is then, that this notice was not sufficient, because it was served more than 48 hours ago; you say it must be just 48 hours?

Mr. MELLETTE (of counsel for defendant). In order that the court may understand me, I want to ask Mr. Brooks a question.

(To Mr. Brooks). After this jury were discharged the next morning were you not called up here in court and disqualified yourself?

A. Yes, sir.

Mr. MELLETTE (of counsel for defendant). That was notice to us he was disqualified.

The COURT. Let the record show the gentleman is challenged for cause, and the cause sustained. It does not make any difference about the reason for the cause.

Mr. WILSON G. GRAY was then examined touching his qualifications as a juror.

Mr. MELLETTE. We desire to challenge this gentleman as a juror, because he has not been served on us.

The COURT. The assertion is incorrect. I do n't want it to go down that way. He has been served.

Mr. MELLETTE (of counsel for defendant). I would like to state my position——

The COURT. State it as it is, but do not state he was not served. I know how easy it is to mix up a record that will deceive somebody.

The ASSISTANT DISTRICT ATTORNEY. Wait until we get through with him, and we will turn him over to you.

Mr. MELLETTE (of counsel for defendant). It is not proper for me to wait that long, because I do not want him presented.

50 The COURT. You are not examining him now. You will wait until he is examined by the other side, and then you can put in your objections.

The ASSISTANT DISTRICT ATTORNEY. Did you hear any part of the statement of this case the other day? That is, when it was first commenced?

A. No, sir.

Q. Have you any bias or prejudice either for or against the defendant?

A. No, sir.

Q. In a case where the punishment is death if found guilty have you any such conscientious scruples that would prevent you returning a verdict of guilty if the law and the evidence warranted such a verdict?

A. No, sir; I have not.

Mr. MELLETTE (of counsel for defendant). If the court please, I desire to offer a challenge to this gentleman on the ground that his name was not on the list last served on us.

The COURT. Now, to state the thing as it is, let the record show that he was on the first list that was served. The challenge is overruled.

Mr. MELLETTE (of counsel for defendant). We except to the ruling of the court.

WILLIAM C. HARRISON, having been duly sworn to answer all questions touching his qualifications as a juror, made the following statement:

I have formed or expressed no opinion, but I heard a little of Mr. Mellette's statement to the jury, but not enough to know any of the substance of the case.

Q. Did you hear any of the evidence?

A. I heard one witness on the stand.

51 The COURT. I think that would disqualify him.

DANIEL HARRISON, having been duly sworn to answer all questions asked him touching his qualifications, made the following statement:

I was in here when the district attorney got up to state the case, and I was sick and went home. I didn't hear the statement.

Q. You have no opinion, then, at all as to his guilt or innocence or as to the merits of the case?

A. I left the court room.

Q. Do you answer you have no opinion at all?

A. Yes, sir.

Q. Have you any bias or prejudice, either for or against the defendant?

A. No, sir.

Q. Or in any way related to the defendant, or to the deceased, Charles Hermes?

A. No, sir.

Q. In a case where the punishment is death if found guilty, have you any conscientious scruples that would prevent you returning a verdict of guilty if the law and the evidence warranted such a verdict?

A. No, sir.

WILLIAM MCCASLIN was sworn, and upon being examined touching his qualifications, stated that he had heard part of the statement in the case when it was called heretofore, and was by the court therefor declared to be disqualified to sit as a juror.

The clerk then, under direction from the court, called a sufficient number of names to fill up the panel.

Mr. MELLETTE. We ask the court to exclude Wm. R. Clarady and John Nesbit, because they were not served on us on this last list, and we desire to offer a challenge to them for that cause.

52 The COURT. That is overruled, on the same ground that the other was. You have been served with them.

Mr. MELLETTE (of counsel for defendant). We object to them for another reason: They were called on the morning of the 24th of last month (November), and stated they had formed opinions, and we have reason to believe——

The DISTRICT ATTORNEY. He has a right to make his objections, of course, but——

Mr. MELLETTE (of counsel for defendant). I do not understand that we can have jurymen promiscuously from a list that has not been served on us.

The COURT. Do not assert they have not been served on you. You are simply trying to fix this record for the Supreme Court; to get something in the record that does not belong there, and get a reversal on that ground. That is what you are doing here, manifestly.

Mr. MELLETTE (of counsel for defendant). I desire to read a written challenge, I have prepared, to these jurors.

The COURT. The time has not yet arrived for you to examine this man.

Mr. MELLETTE (of counsel for defendant). I except to the ruling of the court.

The COURT. I have not made any ruling.

Mr. MELLETTE (of counsel for defendant). Can I state my objections now?

The COURT. No; you can not state it now. We will qualify this man first. The court takes notice of the fact that he has been served
53 regularly as a juror. We will see whether he is qualified. If he is disqualified we will stand him aside; if he is not, he will be accepted.

Mr. WM. P. CLARADY, having been duly sworn to answer all questions put to him touching his qualifications as a juror, was examined as follows, to wit:

Q. Have you formed or expressed any opinion as to the guilt or innocence of the defendant?

A. Yes, sir; I heard the case presented the other day by both sides.

The COURT. Did you hear the statement of the witness who testified?

A. Yes, sir.

The COURT. That would disqualify you; you will stand aside.

Mr. MELLETTE (of counsel for defendant). Can I object——

The COURT. No, sir; not on this juror. He is out of this panel.

Mr. MELLETTE (of counsel for defendant). I except to the ruling of the court in permitting his name to be called—that is, as to Wm. P. Clarady, and also John Nesbit.

JOHN NESBIT, having been duly sworn to answer all questions touching his qualifications, was examined, as follows:

Q. Did you hear a statement of this case the other day?

A. I heard a part of the statement of the old gentleman, the witness on the stand, the other day.

The COURT. That would disqualify you; you may stand aside.

The court then directed the clerk to fill the panel.

Mr. MELLETTE (of counsel for defendant). We ask the court not to have these jurymen called.

The COURT. The court has had them called, and they will be called.

Mr. MELLETTE (of counsel for defendant). Can I except to
54 that ruling? I except to them on the ground that they were not served on us on the last list, and shall ask the court to pass on that ruling.

The COURT. The court has passed on that two or three times; it is not necessary to pass on it again. The court decides that the record shows the list was served on the defendant during this term of this court, and this statement that they have to be served just 48 hours before is simply nonsense.

Mr. MELLETTE (of counsel for defendant). They are not on the last list is the reason I desire to challenge them. We except to the ruling of the court.

THEODORE OBER, having been duly sworn to answer all questions touching his qualifications as a juror, was examined as follows:

Q. Have you formed or expressed any opinion as to the guilt or innocence of the defendant?

A. I heard the statement the other day, but I don't remember any details about it; I was reading.

Q. Did you hear any part of the evidence?

A. No, sir.

Q. You were not here when the witness was on the stand?

A. No, sir.

Q. You answer you have no opinion in the case at all?

A. No, sir; I have none at all.

Q. You were in the room at the time the statement was made, but did not hear what was said?

A. No, sir; I could not say what was said, because I wasn't paying any attention.

The COURT. He says he heard the statement, and I think he is disqualified, and he may stand aside.

55 Mr. WILLIAM M. PERKINS, having been duly sworn to answer all questions touching his qualifications as a juror, was examined as follows:

Q. Have you formed or expressed any opinion as to the case?

A. No, sir; I don't know that I have.

Q. Did you hear the statement of the case on either side the other day?

A. I don't remember that I did; I don't think I did.

Q. Did you hear any part of the evidence?

A. I don't think I did.

Q. Were you in the court room?

A. I was in the court room while the jury was being selected, a portion of it, and I think I left pretty soon before the jury was made up.

Q. And you didn't hear any statement by the counsel for the Government or counsel for the defendant?

A. No, sir.

I am not related to the defendant, nor was I to the deceased. I have no such conscientious scruples as would preclude me finding a verdict of guilty in a case where the punishment was death if the law and the evidence warranted such a verdict.

Mr. MELLETTE (of counsel for defendant). Were you in court upon the morning after the jury was discharged, and examined as to your qualifications on that morning?

A. No, sir; not afterwards.

Q. You were not examined afterwards?

A. No, sir.

Mr. MELLETTE (of counsel for defendant). I challenge the juror on the ground that he is not on the list served on us on the 27th of November.

The COURT. The court decides he has been served more than 48 hours before time of trial, and he is a qualified juror.

56 Mr. MELLETTE (of counsel for defendant). We desire to except to the ruling of the court.

SENECA RALPH was examined and declared disqualified by the court on the ground that he had heard statement of the case and the testimony of the first witness as far as he testified.

CALLOWAY C. SEALS was also excused for the same reason.

Mr. JOHN SMITH was duly sworn to answer questions touching his qualifications as a juror and examined as follows:

Q. Were you in the court room at the time the case was commenced for trial the other day?

A. No, sir.

Q. Did you hear the statement of the case to the jury?

A. No, sir.

Q. Or any part of it?

A. No, sir.

Q. Have you formed or expressed any opinion as to the guilt or innocence of the defendant?

A. No, sir.

The defendant then made five peremptory challenges.

The court directed the clerk to call in a sufficient number of gentlemen to fill the panel.

Mr. MELLETTE (of counsel for defendant). We object to these gentlemen who are now being called as jurymen on the ground that they were not upon the last list served upon us, and upon the ground also that they had been called at one time and disqualified in this case.

The COURT. We will see if they are disqualified now.

Mr. MELLETTE (of counsel for defendant). We object to their being called.

The COURT. You have no right to do that. That is not a challenge.

Mr. MELLETTE (of counsel for defendant). We claim that the
57 regular panel of jurors is not being called; that in this case there are only 17 of them, and now the court is having all of them called.

The COURT. They are all qualified, provided they come up to the other requisite.

Mr. MELLETTE (of counsel for defendant). They have heretofore, on the 24th of this month, expressed opinions in this case, those who are being called now.

The DISTRICT ATTORNEY. If they have expressed opinions we will discharge them.

The COURT. The gentlemen called will be sworn to answer questions touching their qualifications.

Mr. MELLETTE (of counsel for defendant). We say it is not the regular panel of jurors; that they should not be called as the regular panel.

The COURT. You will have a good time showing that, I reckon. Your assertions will not weigh more than the record, I guess.

Mr. ROBERT SPOON was excused by the court because of sickness.

Mr. ——— SLOAN was examined as follows:

Q. Were you present in any part of the case the other day? Were you on the jury that was commenced the other day?

A. I was called off the jury.

Q. What do you mean by being called off the jury.

A. Excused.

The COURT. I suppose you were challenged, were you?

A. Yes, sir; I was challenged.

The ASSISTANT DISTRICT ATTORNEY. Were you present in the court room and heard the statements of counsel on either side?

58 A. No, sir; I went right out.

Q. Did you hear any part of the evidence in the case?

A. No, sir.

Q. You did not hear any part of the statement of counsel on either side?

A. No, sir.

Q. Have you formed or expressed any opinion as to the guilt or innocence of the defendant?

A. No, sir; I have not.

Mr. MELLETTE (of counsel for defendant). I desire to challenge Mr. Sloan on the ground that his name is not on the last list served on us.

The COURT. The record shows that he was on the list of jurors served upon the defendant, and he is therefore pronounced qualified.

Mr. MELLETTE (of counsel for defendant). We except to the ruling of the court.

W. J. WEAVER was examined and found to be disqualified by the court because of having heard the witness testify in this case when the trial was commenced heretofore.

Mr. JEREMIAH MCKENSIE was examined as follows:

Q. Were you in the court room the other day at the commencement of the case?

A. Yes, sir.

Q. Did you hear the statements of counsel on both sides and a part of the evidence?

A. Yes, sir.

Q. Did you form any opinion from that evidence?

A. Yes, sir; I think so.

The COURT. You may step aside on the ground that you heard a part of the evidence in the case and statements of counsel.

BENJAMAIN KAIN was examined and declared by the court disqualified because of his having been present in court room and heard

59 statements of counsel and evidence of witness.

P. M. SAVAGE was excused upon same ground.

The court directed the clerk to fill the panel, which was accordingly done.

Mr. Trotter's name was called.

Mr. MELLETTE (of counsel for defendant). We object to his being called, your honor.

The ASSISTANT DISTRICT ATTORNEY. Were you present the other day when the case was commenced?

A. Yes, sir; I was in the room.

Q. You heard the statements of counsel and the evidence as far as it went?

A. Yes, sir.

The COURT. Did you form an opinion from that touching the merits of the case?

A. Yes, sir.

The COURT. You may step aside; that would disqualify you.

Mr. DAVID S. PATRICK was examined as follows:

Q. Were you in the court room the other day when this case was commenced before?

A. Yes, sir.

Q. Did you hear the statements of counsel on either side?

A. Yes, sir; but I did not hear any of the evidence.

Q. You heard the statement on both sides?

A. Yes, sir.

The COURT. Did you form some opinion from that statement?

A. No, sir; I did not.

The COURT. Did you hear the statement of the witness as far as it went?

A. No, sir; I did not; I went out.

The COURT. I do not think, as a matter of prudence, it would be best to leave the gentleman on the jury, he having heard counsel on both sides make a statement of the case.

60 The DISTRICT ATTORNEY. I do n't think so either. He ought to be challenged for cause.

The COURT. He may stand aside, and on the ground that he heard the statements of counsel on both sides.

Mr. JERRY HARLAN was examined, and stated that he had heard the statements of counsel on both sides and the evidence of the first witness as far as it went, and was thereupon by the court declared disqualified to sit as a juror in this case.

Mr. WM. F. ROWE was examined, and stating he had heard the statement of counsel on both sides, and part of the evidence of the witness as far as it went, was declared disqualified by the court to sit as a juror in this case and was excused.

Mr. HENRY SIMPSON was examined as follows:

Q. Were you in the court room the other day when the case was commenced?

A. Yes, sir.

Q. Did you hear any part of the statement by counsel?

A. Yes, sir.

Q. Did you hear any part of the evidence?

A. Yes, sir.

Q. Did you form an opinion from that?

A. No, sir; I did not form any opinion.

The COURT. You heard both, did you?

A. Yes, sir.

Q. Did you form some opinion from what you heard?

A. Some little; not much.

The COURT. I think it is prudent you should be excused.

JOHN W. YOES was examined and qualified himself as a juror.

Mr. JOSEPH RITTER was examined and qualified himself as a juror.

Mr. MELLETTE (of counsel for defendant). We desire to pre-
61 sent a challenge as to all of these new jurymen. I have written it, and will read it, as follows:

62 The COURT. The motion to quash the panel is overruled.

Mr. MELLETTE (of counsel for defendant). We desire to save an exception.

The above and foregoing contains a record of proceedings as to that part of the selection of jurors which was objected to by the defendant. Where jurors were not objected to for cause or otherwise their examination does not appear.

Mr. MELLETTE (of counsel for defendant). If the court please, there is a plea which is to be tried in this case. I do not understand what the ruling of the court will be, whether it will be tried with the other——

The COURT. I think so; there is no trouble about it.

Mr. MELLETTE (of counsel for defendant). Will the court make an order or announce that the plea is to be tried?

The COURT. I do not think any order is necessary.

Mr. MELLETTE (of counsel for defendant). They are to be both submitted?

The COURT. Yes, sir; of course that goes in as a part of the defense in the case.

62 JACOB HERMES, having been duly sworn upon behalf of the Government, was examined by the district attorney, Hon. James F. Read, and testified as follows, to wit:

Question. What is your name?
Answer. Jacob Hermes.
Q. Where do you live?
A. Okmulgee, Creek Nation.
Q. Do you know the defendant, Thomas Thompson?
A. Yes, sir.
Q. Did you know Charles Hermes?
A. Yes, sir.
Q. What relation, if any, was he to you?
A. Charles Hermes was my son.
Q. Where do you live?
A. I live near Okmulgee, in the Creek Nation.
Q. Were you renting land up there?
A. Yes, sir.
Q. From whom were you renting land?
A. From Sam Haynes.
Q. Where is your son, Charles Hermes, now?
A. He is dead.
Q. How did he come by his death?
A. The defendant killed him; he shot him.
Q. Where did the killing take place?
A. On the 8th of June, 1893.
Q. Where?
A. In the cornfield.
Q. In what nation?
A. In the Creek Nation, Indian Territory.

Q. Was your son a white man or an Indian?
A. He was a white man.
Q. Is the defendant a white man or an Indian?
A. He looks like an Indian.
Q. What time in the day was it that he was killed?
A. I guess it was between 2 and 3.
Q. About what was the size of that cornfield?
63 A. I had about 35 acres of corn, but the field is about 100 acres big.
Q. What was there in the remainder of the field?
A. There was about a quarter of a mile each way—the field was.
Q. You had 35 acres of corn. What else did you have in the field?
A. Millet.
Q. What side of the field was the corn on?
A. That corn was in the middle of the field.
Q. Millet on each side of it, then?
A. Yes, sir; except on the south side there wasn't millet.
Q. What was on the south side?
A. The southside, it run to the fence.
Q. What direction did Sam Haynes live from the field?
A. He lived east of the field.
Q. (Witness is shown diagram.) You had corn in the middle; run clear through the field?
A. No, sir; there was a fence set off a little, and on the south side it run to the fence.
Q. There was millet on three sides of the corn?
A. Yes, sir.
Q. The corn run to the fence on the south side?
A. Yes, sir.
Q. How did the rows of corn run there; was it checked off, or how?
A. It was check rows.
Q. Then they run north and south and east and west?
A. Yes, sir.
Q. Go ahead and tell what occurred at the time of the killing of your son; tell all about it now.
A. On the 8th of June, after dinner, when we went out in the field to plow corn, and we got out, Thompson—there he set by a brush, and we thought he was picking dewberries at that time. We passed and went into the field, and opened the gate and got in the field, and as soon
64 as we were in the field, Thompson he was right with us, to the right, outside, and we went inside to our plows, three of us, and when we got to our plows he rode off and give a couple of yells. That was all I seen for that time.
Q. What day was that?
A. That was a little after one o'clock. We started on and plowed, and we didn't talk or nothing, and he come back again, and when he come back again he killed my boy.
Q. Had you seen him that morning before?
A. Not as I know of.
Q. When you came back from dinner after 1 o'clock he was out in the prairie, you say?

A. Yes, sir.
Q. How far was he from your field?
A. About 50 or 60 yards. I can't tell exactly. I guess about that much.
Q. You say you thought he looked like he was picking dewberries?
A. Yes, sir.
Q. Did he have his horse there with him?
A. Yes, sir.
Q. Where was the gate to that field?
A. The gate is on the southeast corner, on the south side.
Q. Which way did you go when you entered the field?
A. West.
Q. How did he go?
A. The same way. He came along right down on the outside of the fence.
Q. How close to the fence was he?
A. Right close.
Q. How close to you all?
A. There wasn't so very much room; there was a turn row, and between the corn and fence we went down.
The COURT. He was on the outside, was he?
A. Yes, sir.
The DISTRICT ATTORNEY. The defendant was on the outside and
65 they were on the inside of the fence. (To the witness.) You were going down the turn row at the end of the corn?
A. Yes, sir; we went down the turn row.
Q. Then he could not have been very far from you?
A. No, sir.
Q. About how many feet, do you think?
A. From 8 to 10, maybe.
Q. Was anything said to him there by any of you?
A. Not a word.
Q. How far did you go before he turned off?
A. Went down about a quarter of a mile to where our plows were.
Q. Then you say he turned off?
A. He went right straight on west.
Q. Yelling as he went?
A. Yes, sir.
Q. Did he ride rapidly?
A. Pretty fast; when he left us he did.
Q. Did he have any bundles or anything of that kind?
A. Not that I seen.
Q. Whose horse was he riding?
A. Sam Haynes'.
Q. Was there a road along there the way that he was going?
A. Sort of a trail way along there, going around the fence. There was no road there before.
Q. What direction was he from the field when you all first saw him? Was he in the direction of Haynes' house?
A. Yes, sir; between the fence and Haynes' house.
Q. How long after that was it before you saw him again?

A. About an hour and a half.
Q. Where was he when you first saw him the last time?
A. He came back; he came a little more from the southwest.
Q. What horse was he riding then?
A. That same horse; Sam Haynes.'
66 Q. Was he coming towards the field when you saw him?
A. Yes, sir.
Q. How close to the field fence did he come?
A. Right close.
Q. Right up to it?
A. Yes, sir.
Q. On his horse?
A. Yes, sir.
Q. Where were you and your sons when he rode up there to the fence? How far were you from the fence?
A. I was about 45 yards.
Q. How far were the others from the fence?
A. They were right close to the fence.
Q. Which way were you plowing; from the north to the south?
A. Yes, sir.
Q. Which one of your boys was in advance; was ahead?
A. Them two boys was pretty near alike.
Q. Pretty near together?
A. Yes, sir.
Q. How far were you behind them?
A. About 45 steps.
Q. Then they were at the fence when he rode up, were they?
A. Yes, sir.
Q. Did you hear any conversation that took place between them?
A. I heard some talk, but I don't know what it was. I could not understand it. I was straightening up the corn.
Q. Go ahead.
A. I looked up, and when I looked up he shot my boy.
Q. Was your boy facing him at the time he shot him?
A. Yes, sir. He was doing the talking, and the boy turned around and looked at him, and he shot him right in the breast.
Q. Where did the ball come out?
A. The ball did not come out.
Q. What became of you?
67 A. He aimed at me at the same time, and I jumped behind the horse.
Q. Which one of the boys was ahead, or do you know?
A. They were both at the end, and stopped for turning around.
Q. They were both about even, then?
A. Yes, sir.
Q. The trail way ran down toward the southeast corner of your field, this way [indicating on a diagram shown the witness]?
A. Yes, sir.
Q. Your gate is in the southeast corner of the field?
A. Yes, sir.

Q. When you saw this boy first indicate on this diagram where he was?

A. About here [indicating].

Q. When he came back what direction did he come from?

A. More from this way [indicating on diagram].

Q. He came from the southwest, you say?

A. Yes, sir.

Q. Your boys, Charley and George, had reached the turn row, then, by the time he rode up to the fence?

A. Yes, sir.

Q. About how far apart were they at that time when he shot him, Thompson and Charley?

A. They measured it off the very same day, and it was 13 steps.

Q. Did you see it measured?

A. Yes, sir; I seen it measured.

Q. 13 steps?

A. Yes, sir.

Q. Charley and Thompson were 13 steps apart when Thompson fired?

A. Yes, sir.

Q. You saw where his horse was?

A. Yes, sir.

Q. Did Charley turn his horse?

A. He started to turn his horse, and he turned around to look at Thompson when he did the talking, and he shot him.

68 Q. Then you say he aimed at you?

A. Yes, sir.

Q. And you jumped behind your horse?

A. Yes, sir.

Q. What became of Thompson then?

A. He rode off; rode out to Sam Haynes's house.

Q. What direction did you go?

A. I unhitched and I went the same way; I followed him.

Q. Could you see him all the way to Hayne's house?

A. Yes, sir.

Q. About how far is Hayne's house from the field?

A. It is over half a mile, I guess it is.

Q. What did Thompson do when he rode up to Haynes's house?

A. He handed his gun to one or two standing there, and he handed the gun to one of them, and got off that hore, and they talked together—I guess they talked together—they stood together; I did n't hear it; I saw them standing there together.

Q. Then what was done? What did he do after he talked or stood there? Did you see what became of Thompson?

A. No, sir; he stood there, and I went around then and went for my Winchester; I sent the boy for my Winchester before.

Q. You sent him for your Winchester before you left the field?

A. No, sir; I had left the field a good while; I followed him on the prairie, and when he had the Winchester he was trying to shoot me, and I wanted to go for the doctor, and so I sent for my Winchester, and taken the Winchester and went for the doctor.

Q. What direction did you live from the field?
A. South.
Q. Do I understand you that when Thompson left, going off
69 towards Haynes's, you at once unhitched your horse and followed him?
A. Yes, sir.
Q. How far did you go?
A. I went about 100 yards.
Q. Did you turn around then and go back?
A. I had to go back again; I had to go back to get in the road.
Q. You went back to the road?
A. Yes, sir.
Q. Where was your son when you sent him for the Winchester?
A. He went to the house to get it.
Q. When was it you told your son to get the Winchester?
A. He was a little ahead of me, and when he opened the gate I told him that.
Q. Had you started up to Haynes's, and then did you go back before you sent your boy after the Winchester?
A. No, sir; I sent the boy after the Winchester when I left the gate.
Q. Just as you rode out of the field?
A. Yes, sir.
Q. Did you hollo to him to go and get your Winchester?
A. Yes, sir.
Q. And then you went on after Thompson?
A. And then I went for the doctor, and when I got on the prairie there Thompson came around there, and I saw him; I went southeast for the doctor, and he come right due east is where I saw him. When I got out on the prairie he came around there, and I thought, "Now, he is coming for me."
Q. He was riding east and you were going southeast?
A. Yes, sir.
Q. Had he left Sam Haynes's house?
A. Yes, sir.
Q. Now, I want to understand you; I do n't know that I get that myself exactly. When he fired this shot what did he say—that is, Thompson?
A. He came around and aimed at me.
70 Q. And you jumped behind your horse?
A. Yes, sir.
Q. What did he do?
A. He went off.
Q. How did he go off; fast or slow, or how?
A. He had a horse that he could not ride very fast with. He rode in a pretty good pace.
Q. Did he say anything when he rode off?
A. Not a word.
Q. Then you got on your horse, did you?
A. Yes, sir.
Q. Which way did you go?
A. The same way; east.

Q. You went out of the field first?
A. Yes, sir.
Q. Where did you get out of the field at?
A. By the gate.
Q. When was it, now, that you told your boy to go and get your Winchester?
A. When I got to that gate—the boy was there opening the gate for me, and I told him to go to the house and get my Winchester.
Q. Did you go towards Mr. Haynes's house then?
A. Yes, sir.
Q. How far in that direction did you go then?
A. I went about 100 yards.
Q. Then what did you do?
A. Then I went to this man there.
Q. Then what did you do?
A. Then I went back, turned around and got the Winchester from the boy; he was coming from the house with the Winchester.
Q. Where did you meet the boy with the Winchester?
A. Between my house and the field.
Q. Your house, you say, is south from the field?
A. Yes, sir.
Q. You turned and met the boy, did you?
A. Yes, sir.
Q. And then you rode off in what direction?
A. Southeast to town.

Q. And you saw this Thompson going east from Sam Haynes's
71 on another horse?

A. He was going south.
Q. Was he coming towards you?
A. He was away off from me when I first saw him, went due south and I went south east.
Q. Did you see him when he got this horse at Sam Haynes's house?
A. No, sir.
Q. You did not see him when he mounted that horse?
A. No, sir.
Q. What kind of a horse was he riding when he rode off from Sam Haynes's house the last time, or could you tell?
A. Brown horse.
Q. Whose horse was that?
A. Sam Haynes's horse.
Q. How long after that was it before you saw Thompson again?
A. About 6 or 7 minutes.
Q. Where was he then?
A. Out on the prairie.
Q. Did you see him any more after that?
A. No, sir. Of course I could see him going.
Q. After he left that day when was it you saw him again?
A. I saw him again after that with the same horse of Sam Haynes's; came around on the fence of the cornfield with the very same horse that he rode off with—that brown horse.
Q. Was that after your boy was killed?

A. Yes, sir.
Q. How long after?
A. I don't know; I can't tell.
Q. He was around your field again, was he?
A. Yes, sir.
Q. Was it the same day?
A. Oh, no; it was after that.
Q. Do you remember how long?
A. I don't know how long.
Q. Did you ever have any conversation with him about the matter after he shot your boy?
A. No, sir.

Q. How was your boy lying after he was shot?

72 A. I can not say exactly. There may be somebody else here that can tell that better than I can. He laid with his head east, I believe—a little northeast, I think.

Q. How far from his plow?
A. Right behind the plow.
Q. What kind of lines did he have?
A. He had rope line.
Q. Where were they?
A. They were around his body.
Q. Then he was laying there on the ground?
A. Yes, sir.
Q. Did he plow with them that way?
A. Yes, sir; he plowed with them that way.
The COURT. Around his body or around his neck?
A. No, sir; around his body.
The COURT. They came back over him?
A. Yes, sir.
The DISTRICT ATTORNEY. Did he have two lines on the horse?
A. Yes, sir.
Q. He was lying behind the plow with the rope lines around him?
A. Yes, sir.
Q. Did you have any gun, or him either, out in the field at the time the shooting took place?
A. No, sir.
Q. Did any of you have any gun, you or your sons?
A. No, sir.
Q. Was there any in the field there then?
A. No, sir; not before the shooting was done. After the shooting, and I came back from after the doctor, I had a Winchester with me in the field after that.
Q. When the doctor came back there how was the boy lying?
A. I guess he was lying the same way; I could not tell.
Q. Who did you leave with your boy when you left there?
A. A colored man.
Q. What is your other son's name?
A. Charley.

73 Q. Where is?
A. He is dead.

Q. What is the other boy's name; the one who was not killed.
A. George.
Q. What doctor did you bring back with you?
A. Dr. Bell.
Q. Did you examine your boy before you left the field?
A. Yes, sir; I opened his shirt and looked where the bullet went in.
Q. How long did he live after he was shot?
A. He could not live long, and I didn't stay a long time with him, and I went on and went for the doctor. I could not tell, but he could not live long; he could not talk or nothing.

The COURT. How was he lying with reference to these lines when you examined him there?
A. He had the lines around that way [indicating].
The DISTRICT ATTORNEY. The plow was pointing north, was it?
A. It was pointing south.
Q. And he lay right behind the plow?
A. Yes, sir.
Q. His head a little to the northeast?
A. Yes, sir.
Q. Was he laying on his back?
A. Yes, sir.
Q. The lines under him?
A. Yes, sir.
Q. Around his body?
A. Yes, sir.
Q. Was your son alive or dead when you returned with the doctor?
A. He was dead.
Q. The doctor examined him, did he?
A. Yes, sir.

Cross-examination by Mr. THOMAS H. BARNES:

Q. What time of day did you say this killing was?
A. I guess it was between two and three; I didn't have any clock.
Q. You guess it was closer to three than to two?
A. Yes, sir.
74 Q. When he was there picking berries, that is the first time you had seen him that day was it not?
A. Yes, sir; the first time that I noticed.
Q. You don't claim to have seen him until you were going out after dinner, and you thought he was picking dewberries. I believe you stated blackberries before the commissioner. I don't know that there is any point in that. You say it is something over a half mile from Haynes' down to this gate?
A. Yes, sir.
Q. The boy was a little south of the line, or of the road, leading from Haynes's house to that gate picking berries, when you saw him?
A. Yes, sir.
Q. How far from the gate?
A. About 55 or 60 yards; maybe a little more. I don't know exactly; I never measured it.
Q. How far was he from that road; a few steps, or how far?

A. He was not on the road at all.

Q. He was a little west of south of the road that he would travel going towards the gate?

A. Yes, sir.

Q. And 50 or 60 yards from the gate?

A. Yes, sir.

Q. You live south from that field?

A. Yes, sir.

Q. I suppose in going from your house to the gate you came pretty straight, did you not?

A. Yes, sir.

Q. Then the boy was not on a line with where you were going at that time at all, but was back that way, and off his horse?

A. Yes, sir.

Q. Was there a lake out there in the corner of this field, a slough, or something there like that?

A. There is a little water standing around there where it lays whenn it rains.

Q. A wet weather lake, then?

A. Yes, sir.

75 Q. Does Mrs. Checotah live out in this direction?

A. She lives west.

Q. The boy traveled along the fence or trailway, and the last you saw of him at that time he was going west?

A. Yes, sir.

Q. That would be in a general direction of where this woman lives?

A. I don't know——

Q. She lives west anyway. You said at first to Mr. Read when he was riding around the fence he was going east, and you changed that to say he was going south, and you going southeast?

A. He was east.

Q. He was east of you, going south?

A. Yes, sir.

Q. You were going southeast, and that would cause you to bear something in the direction that he was going?

A. Yes, sir.

Q. Okmulgee is nearer south than east from that field; a little south, or east of south, is it not, from that field?

A. Yes, sir.

Q. How far is Okmulgee from there?

A. I believe it is about two miles and a half.

Q. How much of this field was in woodland, if any, and how much was in cultivation at all?

A. From 8 to 10 acres.

Q. About 100 acres in the field?

A. Yes, sir.

Q. That trail was led along the fence?

A. Yes, sir.

Q. What sort of a pony or horse was that boy riding when you first saw him there?

A. A roan pony.

Q. Was he saddled or not?

A. I don't remember; I do not think that he had a saddle.

Q. Did he have any blanket on him?

A. I don't remember whether he had a blanket or saddle, or whether he was unsaddled.

Q. What is your best recollection?

A. I don't think he had a saddle on.

76 Q. Did he have a blanket on; did you see any gun in the possession of this boy as he rode along there, for a quarter of a mile?

A. No, sir.

Q. Did he have one?

A. I don't know; I didn't see any.

Q. You could have seen it if he had one, couldn't you; do you know whether he had a little bundle or not?

A. No, sir; he had nothing in his hands, except the line—his bridle line.

Q. Did you notice both hands?

A. Yes, sir.

Q. Did he have anything hanging from his arm?

A. Not that I know of.

Q. You claim to have noticed him close enough to tell whether he had anything or not?

A. I didn't pay so much attention to it.

Q. There wasn't anything especial'y to draw your attention, but if he had had any gun or anything, of course, across his lap, you could have seen it?

A. I didn't see him with no gun then.

Q. Didn't the boys or some of you have some difficulty with that boy as you went down there?

A. No, sir; not one word.

Q. Did you have any feeling against him?

A. No, sir.

Q. Any prejudice?

A. No, sir; I did not think that he was going to go and kill somebody.

Q. Previous to this time had you made any threats against this boy to Mr. Sam Haynes or Mr. Checotah?

A. I went to Mr. Haynes and told him that he had killed my hogs; that is what I told Sam Haynes before that; I went right to Sam Haynes' house.

Q. You told him *they* they had killed your hogs?

A. Yes, sir.

Q. Have you ever claimed that before; you testified before the commissioner, didn't you?

A. Yes, sir.

77 Q. Did you ever claim before that this boy, or any other boy killed your hogs?

A. I seen them there with the hogs, and chasing them around and abusing them.

Q. There is a difference between killing and abusing a hog. Did you claim to Sam Haynes that these boys had killed your hogs, or did you complain about Tom and Willie abusing your hogs? I will ask you if this wasn't what your statement was before the commissioner——

The DISTRICT ATTORNEY (to witness). He wants to know what you told Mr. Haynes, now.

A. That is what I told him.

Mr. BARNES (of counsel for defendant). Did you ever tell Sam Haynes these boys had killed your hogs, or did you tell him they had abused them, which?

A. I told him that they had killed them, and they did, too.

Q. How many?

A. I had 13 sows, all with pigs, and I have not got one.

Q. I will ask you if this is not your statement before the commissioner: "The only trouble I ever had with Sam was that I complained to him about Tom and Willie abusing my hogs, and I didn't consider that any trouble."

A. That is what I told Sam Haynes.

Here court took a recess until half-past one.

78 Afternoon session, 1.30 p. m.

Continuation of cross-examination of Jacob Hermes.

By Mr. BARNES:

Q. I was asking you about your statement before the commissioner before dinner. I will ask you if you stated "the only trouble I had with Sam was that I complained to him about Tom and Willie abusing my hogs. I didn't consider that any trouble"? And, further: "And he told me that he did't know an'thing about it, but he would look into it." Was that what you said in this case when it was before the commissioner? You did not speak about the hogs being killed, or anything of that sort, did you? Do you think you stated it before the commissioner about as I have read it?

A. Yes, sir.

Q. As you went into the gate and was going down towards where your son was killed, did you say that the defendant rode along the fence on the outside, as you went along on the inside?

A. Yes, sir.

Q. About 8 feet between you?

A. 8 or 10; I didn't measure it exactly.

Q. He did not yell in any way until after he had gone on a ways past where you people were?

A. Yes, sir.

Q. How far had he gotten west of you before he hallowed? You speak of his yelling.

A. When he left us there he did.

Q. He had left you and had gone on a little piece before he halloeed?

A. He left us, and halloed when he left us.

Q. How far had he left you?

79 A. He was on the outside of the fence.

Q. I will ask you if you made this statement before the commissioner: "The defendant rode off apiece and made a couple of yells." Is that the way you stated it heretofore—not that he yelled just as he left you, but after he rode off apiece?

A. After he rode off he did the yelling.
Q. He had rode off apiece before he did that?
A. If he did it was a very little piece.
Q. You don't know what he was yelling at, do you?
A. No, sir.
Q. Do you know Sam Haynes and Sam Checotah?
A. Yes, sir.
Q. I will ask you if, shortly before this killing, at your house, you did not say to them that this boy, Tom Thompson, the defendant, had been around there cutting up, acting the monkey, and described how he did, like a monkey, and that if he did so any more you were going to take a hatchet and chop his head——

Mr. BYERS (counsel assisting the district attorney). Fix the time and place.

Mr. BARNES (of counsel for defendant). Shortly before this killing took place, at the house.

A. Not that I know of.
Q. Do you deny having such talk, and at the same time did you not ask Haynes to drive the boy away from the premises?
A. No, sir; I didn't say that.

Mr. BYERS (counsel assisting district attorney). Who was that conversation with?

Mr. BARNES (of counsel for defendant). With Haynes and Sam Checotah there. Do you remember that conversation, in which you stated you would chop this defendant's head with a hatchet if he came monkeying around there any more?

80 A. I said if he went to fooloing with me much more I might hurt him.

Q. Who did you say that to?
A. To Mr. Haynes. Mr. Haynes told me that I should watch these boys and look after the work, and I told him I had nothing to do with him and Sam Haynes. After that he came to me and asked me how the boys did, why they wasn't at work, and I told him that that fellow acted the monkey, setting on a post or on the ground, and lay in the grass, was what he was doing. That is what I told Mr. Haynes.
Q. Didn't you tell him at the same time that if he did it much more you would take a hatchet and chop his head?
A. No, sir; I did not that day.
Q. Did you at any time before this killing threaten you would take a hatchet and chop his head?
A. No, sir; I didn't say that; I said I might hurt him.
Q. Did you ask Haynes to drive him off the place?
A. No, sir.
Q. You know Mr. Baxter, don't you, and Mr. Gregory?
A. Yes, sir.
Q. Did you see them as you came from Okmulgee the day after the shooting—the same day after ic occurred?
A. Yes, sir; I saw them right at Okmulgee when I went for the doctor.
Q. Did you see them after that down at the field anywhere?
A. Yes, sir.

Q. Before your son's remains were removed?

A. Yes, sir; while the boy was laying there dead out there.

Q. Did you say to them, or either one of them, that at that time down there at the field as this defendant came up the field that there was

81 a difficulty there between this defendant and you people, or between Charley, the deceased, and the defendant; that is, as he went up the first time; went by?

A. There was no difficulty between us at all.

Q. Did you tell them that?

A. No, sir.

Q. Didn't you say at the same time that your boy Charley called this defendant a son of a bitch, and said, "Don't you go down to the slough or kill any more of our hogs?"

A. No, sir.

Q. Did you tell Mr. Baxter there at that time that Charley threw down the plow lines and started towards the defendant, and then the defendant shot?

A. No, sir.

Q. Did you tell him that Mrs. Haynes, when the defendant went up to the house where she was, took the gun from the defendant and took it in the house?

A. No, sir.

Q. Did Mr. Baxter come to you and tell you that Mr. Haynes had sent him to you at that time to offer any assistance he could to you?

A. No, sir.

Q. You don't remember that?

A. No, sir.

Q. That Mr. Haynes sent him to assist you if you wanted to catch the boy?

A. No, sir; not as I know.

Q. Didn't you fly in a passion when he told you that?

A. I don't know that——

Q. You were a good deal excited, of course; the boy was killed, and you were distressed. You might have said something and this man might have said something which you do not remember now?

A. I don't remember that Baxter told me that.

Q. You were very much distressed and do not remember that?

A. Yes, sir; of course I was.

82 Q. You stated this morning in your direct examination that this boy rode back to the house after the shooting, and there was two parties standing there in the yard, and that he got down, and you saw them standing there together, but you did not see what he did with the gun, nor you did not see him get on the other horse, although you saw him on the other horse afterwards. That is right, is it?

A. Yes, sir.

Q. I want to know if, on your cross-examination before the commissioner, you did not state this: "Defendant did not attempt to shoot my other boy." You say that now, I believe?

A. Yes, sir.

Q. "When defendant did the shooting he was riding a roan pony. When he rode away he went to Sam Haynes's house, and handed his gun

to Willie Haynes and got onto a brown horse, which stood there already saddled, and rode off." Did you state that before the commissioner?

A. Yes, sir; I guess I did.

Q. Now, you say you did not see him get on that other horse. Didn't you see a buggy standing there?

A. They have got a buggy.

Q. Didn't you see it standing there?

A. Not as I know of.

Q. If this boy rode up there and laid that gun in the buggy you didn't see that?

A. No, sir.

Q. If you didn't know anything about the saddle on the horse, how did it come you stated before the commissioner as though you saw that thing?

A. It was the talk, and he got on a horse——

Q. But you did not see the horse saddled or unsaddled?

A. I saw the horse standing right in front of the house.

Q. Wasn't there two horses there tied together?

A. No, sir; there wasn't.

Q. Wasn't there a buggy there in front of the house?

83 A. I don't believe there was; I don't know. Maybe it was, or maybe it was not.

Q. Did you see a rope on the horse that he got on before he got on him?

A. No, sir.

Q. How far off were you? You were not over half way from the field to the house?

A. I was about half way between the field and the house.

Q. Were you not near about that road?

A. I was right in the road.

Q. Is not that about half way from the field to Hayne's house?

A. No, sir.

Q. How far is it from the field to the house—from the field gate?

A. About one-quarter.

Q. Then it is further from the road to Haynes's house than it is from the field gate to the road?

A, Yes, sir.

Q. Now, do you think, under the circumstances and excited as you were, that that distance you could make a correct observation as to just how this gun was handed out, and how the horse was mounted?

A. Yes, sir.

Q. You think you could?

A. Yes, sir; I seen it.

Q. Why did you swear before the commissioner that you saw him mount that horse and ride away, and swear this morning that you never saw him on the horse until after he had gotten there?

A. I saw him on the brown horse in the yard.

Q. But you did not see this boy get on him in the yard, and you did see the boy on him afterward; is that it? Of course, the commissioner may have got that wrong; I don't know?

A. He wasn't there, but just a little bit and——

84 Q. Didn't you have a gun down there with you?

A. No, sir; I had no gun there before the shooting was done.

Q. Didn't you start your son after the doctor instead of starting in the first place yourself after the doctor?

A. Yes, sir; I started him from the plow, and he had a young mule, and could not ride fast, and I said "I will go."

Q. Which one of you went out of the field first?

A. The boy that was with me opened the gate, and I catched up with him at the gate. He was out first.

Q. It was you, though, that went up to this road I have been asking about, and staid there a little while?

A. Yes, sir; I talked with an Indian fellow.

Q. Are you certain with that Winchester you started after the doctor, or did you start for the boy?

A. I took it along to defend myself with.

Q. As a matter of fact, you know that your son had received a fatal shot; you were well satisfied of that before you left the field, were you not?

A. I thought the doctor wouldn't do him much good, but I wanted him there.

Q. You left a colored man there to watch the remains?

A. Yes, sir.

Q. Although the boy was getting away from there as fast as he could, you got a Winchester; you started after the boy instead of the doctor, didn't you?

A. I went for the doctor. That is what I struck out for, for the doctor.

Q. You didn't say anything about it in your examination in chief, but I guess you will; you shot at that boy, didn't you?

A. Yes, sir; I shot at him twice.

85 Q. What did you shoot at him for?

A. I was afraid of him.

Q. He was unarmed, was he not? You did not see any gun in his possession?

A. He aimed at me.

Q. You mean he had down at the field. That is what you mean; but when you shot at the boy you didn't see any gun in his possession then, did you?

A. I don't know; I guess not.

Q. He was getting away from you as fast as he could, was he not?

A. He came in this way [indicating].

Q. How close were you to him when you shot at him?

A. I don't know; about 200 yards, I reckon.

Q. With a Winchester gun?

A. Yes, sir.

Q. You saw no arms on him at that time?

A. I could not see any.

Q. [Reading.] "Before I got to town the defendant came on to me, and I shot at him twice, and he run off." Is that your statement before the commissioner? That boy was riding away from you when you shot him, was he not?

A. He was coming towards me.

Q. He was getting off as fast as he could, was he not, and you shot at him twice?

A. I shot at him twice.

Q. That is what you got your gun for, if you didn't already have it; you had it in the field, didn't you?

A. No, sir.

Q. You also stated before that Charley was in the lead, and this other a little behind him, and you following behind the other boy at the time of the shooting; now you think that Charley and the other boy were both at the ends of the rows?

A. Yes, sir.

Q. Wasn't the other boy rather behind Charley?

A. They there two boys was right on the turn row.

86 Q. You say it has been measured, and it was 13 steps, was it, or was it feet, from your boy that was shot to this defendant when he fired?

A. 13 steps; they measured it.

Q. Did I understand you to say this morning that the boy had partly turned the horse at the time of the shooting?

A. I guess not; he was ready to turn; he was right on the end for to turn around.

Q. Which way was he going to turn, right or left?

A. To the left.

Q. That would be towards Haynes's house, would it?

A. Yes, sir.

Q. Was this boy straight out from your son?

A. Yes, sir.

Q. How far was this boy from the fence when he shot, Thompson?

A. He was right kind of close in to the fence.

Q. Was he on his horse or off his his horse?

A. On his horse.

Q. In the same conversation I asked you about while ago, with Mr. Baxter, I will ask you if you did not tell him that this boy got down off that horse and came to the fence and stopped?

A. No, sir; that boy was on the horse when he shot him.

Q. Didn't you tell him that he got down off the horse when he came to the fence and fired?

A. No, sir.

Q. In which breast was your boy shot?

A. In the left breast.

Q. A little to the left of a line that would be drawn centerally up and down the body?

A. Yes, sir; a little to the left.

Q. How long had you been living on that place?

A. Not quite two years.

Q. You stated to Commissioner Wheeler that you didn't know what reason or excuse the defendant had for the killing, didn't you?

87 A. No, sir; I said I didn't know, and they asked me on the place where the boy was laying at what the reason was, what I thought at that time, and I told them——

Q. We don't want your thoughts. I just want to ask you if you did not state to General Wheeler that you did not know of any reason or excuse the defendant had for the killing?

A. Yes, sir; that is what I said.

Q. Did you meet Mr. Haynes and Mr. Baxter as you went to town that day?

A. Yes, sir; right on the edge of town.

Q. In town?

A. Yes, sir; when I went in, and they had started home.

Q. Were they in a wagon or horseback?

A. In a wagon.

Q. Who was in the wagon with them?

A. I don't know.

Q. Was there somebody else?

A. I believe there was 4 or 5; I don't know exactly.

Q. How far is Haynes's from Okmulgee?

A. About a mile and a quarter—maybe a little more.

Q. How far is your house from the town?

A. Call it two miles.

Redirect examination by the DISTRICT ATTORNEY:

Q. Do you know what relation there is between Sam Haynes and Thomas Thompson?

A. I heard that Sam Haynes's mother and his father are sisters and brothers.

Q. Then they would be cousins?

A. Yes, sir.

Q. What direction was this defendant coming to you when you fired at him?

A. He was coming from the southeast.

Q. Was he coming towards you?

A. Yes, sir.

Q. Why did you fire at him?

88 A. I thought that he had something, and he would kill me.

Q. You thought he was prepared to kill you?

A. Yes, sir; he aimed at me before.

Q. How long was that after he had shot your boy?

A. That was about maybe 15 minutes.

Witness excused.

89 GEORGE HERMES, having been duly sworn upon behalf of the Government, was examined by Mr. James F. Read, district attorney, and testified as follows, to wit:

Question. What is your name?

Answer. George Hermes.

Q. Did you know Charles Hermes?

A. Yes, sir.

Q. Who was he?

A. My brother.

Q. Where is he now.

A. He is dead.

Q. Who killed him?
A. Thomas Thompson.
Q. Where was Charles Hermes at the time he was killed?
A. In the field; Sam Hayne's field we were working.
Q. What is Charles Hermes's father's name?
A. Jacob Herme.
Q. Where were you at that time?
A. In the field with him.
Q. When was the first time you saw Thomas Thompson that day?
A. As we went out to the field in the afternoon after dinner.
Q. About what time did you go to the field after dinner?
A. About 1:00 o'clock, I think.
Q. Where did you see the defendant?
A. Out on the prairie, on a knoll behind a kind of bush.
Q. What did he do, if anything?
A. He just rode on the outside and we went on the inside.
Q. You went in the field?
A. Yes, sir.
Q. And he rode on the outside of the field?
A. Yes, sir.
Q. How far down did he go with you?
A. Went down a good ways; about 300 yards, I reckon.
Q. You went down to your plows?
A. Yes, sir.
90 Q. What did he do then?
A. He just kept on.
Q. Did he say anything to you while you were going down?
A. No, sir.
Q. Did you say anything to him?
A. No, sir; not a word.
Q. When did you see him next?
A. He came back in about an hour or an hour and a half afterwards.
Q. What did he do then?
A. He was talking to my brother in Creek, and all I could understand was "son of a bitch."
Q. Who said son of a bitch?
A. The defendant.
Q. How long did he talk to your brother in Creek?
A. I do not remember.
Q. Where was your brother and you at that time?
A. At the end, at the turn row.
Q. Where was your father?
A. He was 35 or 40 yards behind us.
Q. What did he do when he said "son of a bitch?"
A. He shot my brother then.
Q. Did he hit him?
A. Yes, sir.
Q. How close was Thompson to your brother then?
A. About as close as from me to where he is sitting now [indicating about 30 feet].
Q. Did you have a gun out there?

A. No, sir.
Q. Was there a gun or pistol in the field?
A. No, sir.
Q. Where was your brother shot?
A. In the left breast.
Q. Could your brother talk Creek?
A. No, sir; he could not understand.
Q. How do you know this defendant was talking in Creek?
A. He could not talk American.
91 Q. Had you seen this defendant before?
A. Yes, sir.
Q. Could he talk English?
A. Not as I know of.
Q. Had you and your brother ever had any quarrel with him before?
A. No, sir; never did.
Q. Did your father, so far as you know?
A. No, sir.
Q. Was your brother plowing with a horse or mule?
A. A horse.
Q. Had you gotten out to the turn row?
A. Yes, sir.
Q. Which of you got out there first?
A. My brother.
Q. How much ahead of you was he?
A. About as far as me to you [indicating about 15 feet].
Q. Where was the defendant when you first saw him at that time?
A. He was sitting on his horse, right there at the fence, when I first saw him.
Q. Did he speak to your brother first?
A. Yes, sir.
Q. What did he say?
A. I don't know; he was talking in Creek.
Q. What did your brother say to him?
A. Nothing at all.
Q. Your brother didn't speak to him at all?
A. No, sir; never spoke to him at all.
Q. And you heard the defendant say "son-of-a-bitch"?
A. Yes, sir.
Q. And then he shot?
A. Yes, sir.
Q. Which way was your brother's horse pointing then; north or south?
A. South.
Q. The horse had not gotten out to the end of the row then?
A. The horse was standing right close to the fence.
Q. Had your brother turned him to go back?
A. No, sir.
Q. Where did your brother fall?
92 A. He fell right behind the plow on his back.
Q. Where were the lines of the plow, reins?
A. Around his waist.
Q. How many lines did he have?

A. Just one; it was a long one.
Q. Were they on each side of the horse?
A. Yes, sir.
Q. What kind of a plow was it?
A. He had a little diamond plow.
Q. Was it a turning plow?
A. Yes, sir.
Q. What did your brother do when the defendant shot?
A. He fell on his back.
Q. Had your brother left the plow when the shot was fired?
A. No, sir.
Q. Do you know whether he had his hands on the plow or not?
A. I think he had it off his plow, right around that way.
Q. Did you have a gun there or pistol?
A. No, sir.
Q. Was there a gun or pistol there in the field at all?
A. No, sir.
Q. Had your brother started towards the defendant when the defendant shot?
A. No, sir. He was right behind his plow.
Q. What did you do when your brother was shot?
A. I unhitched the mules, and my father told me to start for the doctor, and I started, and he hollered at me then to get the Winchester.
Q. Where was the Winchester?
A. At the house. I went there for it. I went and got it and brought it down to where he was.
Q. At the gate?
A. At the house.
Q. Near the house or at the field?
A. At the house.
Q. Did you get him the Winchester?
A. Yes, sir.
Q. What did you do then?
A. I started to get a horse to get my brother home.
Q. What did you do towards doing that?
A. I got the horse.
93 Q. Where was your brother lying when you went back to get the horse?
A. Right there yet; right at the same place.
Q. Were you there when the doctor came?
A. No, sir.
Q. When you left your brother was he lying in the same position as he was when he fell?
A. Yes, sir.
Q. What did you do with the horse?
A. Took him home and hitched him up.
Q. Was the plow moved after your brother fell?
A. No, sir.
Q. You left that right where it fell?
A. Yes, sir.
Q. And your brother was lying behind it?

A. Yes, sir.
Q. With the lines around him?
A. Yes, sir.
Q. Where did your father go when you gave him the Winchester?
A. He went to town for the doctor.
Q. Had you ever had any trouble with this defendant before?
A. No, sir.
Q. And had your brother or father as far as you know of?
A. No, sir; none of them.
Q. Had you seen the defendant that afternoon when you first saw him—did he have a gun when you first saw him?
A. Not as I know of; no, sir.
Q. When he came back the last time which direction did he come from?
A. He come west; looked like he did.
Q. He was right near the fence when you saw him?
A. Yes, sir.
Q. When you first saw him after dinner there did he have a bundle of any kind?
A. No, sir.
Q. What did he have in his hand?
A. He didn't have anything that I seen but the reins?
Q. Do you know what became of the gun after he shot your brother?
94 A. He went up to Mr. Sam Haynes's house, and I don't know who took the gun.
Q. Did you see anybody take the gun?
A. No, sir.
Q. You could not see from where you were?
A. No, sir.
Q. He went right to Sam Haynes's house?
A. Yes, sir.
Q. Did you see the defendant after that?
A. I saw him going away; yes, sir.
Q. What kind of a horse was he riding when he went away?
A. Brown.
Q. Was he riding the one he was on when he shot your brother?
A. No, sir; he was riding a roan pacing horse then.
Q. Did your brother start to get a gun when this man shot him?
A. No, sir; just stood right behind his plow.
Q. Did you see the defendant give the gun to anybody?
A. No, sir.
Q. Your father is of German extraction, is he not?
A. Yes, sir.

Cross-examination by Mr. THOMAS H. BARNES:

Q. You were before the commissioner?
A. Yes, sir.
Q. Your brother turned around and looked at this boy when he was shot, did he not?
A. Yes, sir.
Q. If he was going straight to the fence, and fell backwards, how could he turn around to look at him?

A. He just turned around.
Q. He shot him square in front here?
A. Yes, sir.
Q. Your brother was at the end of the turn row, was he not?
A. Yes, sir.
Q. He had gotten to the end of it?
A. Yes, sir.
95 Q. And he had stopped before the defendant spoke to him, had he not?
A. Yes, sir.
Q. He was plowing from north to south, was he not?
A. Yes, sir.
Q. And the south string of fence was between your brother and the defendant?
A. Yes, sir.
Q. Between your brother and the horse?
A. Yes, sir.
Q. You say your brother had not turned his horse back north?
A. No, sir.
Q. The horse and fence was between them, was it?
A. Not the horse he was plowing, was not.
Q. Between your brother and the defendant?
A. Yes, sir.
Q. Then the horse and fence was between them. Now, don't you know that he partly turned that horse?
A. No, sir.
Q. Had you plowed out to the end of the row at the same time that he did?
A. No, sir; not at the same time; he was there a little while before I got there.
Q. Then you don't claim that both of you were at the end of the turn row?
A. Yes, sir; we were up there, but not at the same time.
Q. Your brother was in front of you, was he not?
A. Yes, sir.
Q. You were not plowing in the same row, but you were close together, and he had got out to the end, and you hadn't, when this occurred; is that the way of it?
A. Yes, sir.
Q. And your father was still back of you?
A. Yes, sir.
Q. Let me read you this, and say if it is right: "Charley came first, and I was next, and my father last." Is that right?
A. Yes, sir.
96 Q. Now, you say when your brother stopped at the end of the row, that is when you heard the defendant talking to him, after he had stopped; is that right?
A. Yes, sir.
Q. Now, didn't you hear your brother say something to the defendant?
A. No, sir; I didn't.
Q. Wasn't it your brother that called him a son of a bitch?

A. No, sir; he didn't.

Q. You say now that your brother had not either turned around or started to turn, or anything of that kind?

A. No, sir.

Q. Haven't you and your father both always claimed that when your brother was shot that he started to turn around—was turning around when he was shot?

A. He turned around and looked at the boy, but he never turned his horse around at the plow.

Q. If he was going right straight to the fence, how could he do that?

A. The field is slanting; it didn't run straight; and the defendant was up that way [indicating].

Q. It run straight where you were?

A. Yes, sir; but it was a little slanting there.

Q. I reckon it wasn't so slanting there but a fellow going north and south would not have to turn around square to look south. You were looking at this boy, and you did not have to turn around to see him. Didn't your brother start towards that fence?

A. No, sir.

Q. The field was cleared out inside of the fence, was it?

A. Yes, sir.

Q. Any timber along right there?

A. No, sir; just a few bushes.

Q. There was no timber in this field you were plowing in?

A. No, sir.

97 Q. Was a part of the field timber?

A. No, sir; it is all prairie.

Q. Was it all in cultivation?

A. Yes, sir.

Q. How large a field is it?

A. I don't know; it is a good big field.

Q. Was that the first year or the second year you cultivated it?

A. First year.

Q. Didn't some of you get after that boy and try to scare him as he went along there?

A. No, sir.

Q. You deny that, do you?

A. Yes, sir.

Q. How far were you from your brother?

A. 25 steps from him.

Q. How far were you from your father?

A. Between 35 and 40 steps or yards, I reckon.

Q. Which one of your went out of that field first, you or your father?

A. I did.

Q. How much first?

A. Not very far?

Q. Was the defendant on or off his horse when he shot?

A. On his horse.

Q. Was the horse saddled or not?

A. I am not sure. I think he had a saddle on, though.

Q. You are not sure?

A. No, sir.

Q. Did he have a saddle when you first saw him that afternoon?
A. I am not sure, but I think he had.
Q. Did he have a gun as he went along down?
A. No, sir; not as I know of.
Q. Can you be any more certain as to whether he had a gun or had a bundle as you can whether he had a saddle?
A. No, sir; I don't think he had a gun.
98 Q. You won't say but what he had a bundle as he went along down there?
A. I think he did have a bundle.
Q. You didn't think that awhile ago, it seems. Was it something apparently tied up in a handkerchief; did he have it in his hand, or how?
A. Had it in his hand, I think.
Q. Did he have it on the side next to the fence, or on the other side?
A. He had it on the other side.
Q. Then he did have the bundle, you think?
A. Yes, sir.
Q. You are not certain, but you think he had a saddle?
A. Yes, sir.
Q. Did he have a blanket on the horse?
A. Yes, sir; I believe he did.
Q. Was it a pretty good size blanket?
A. Regular saddle blanket.
Q. Are you sure as to whether it was a saddle and b'anket, or just a blanket?
A. I think it was a blanket and saddle both.
Q. You are sure he had a b*al*nket?
A. Yes, sir.
Q. He was in about 10 steps of your brother when he shot, was he not?
A. I suppose he was about that.
Q. Your brother fell, and died right away, did he?
A. It wasn't long.

Redirect examination:

Q. What direction did this man come from when he come up there to where you brother was?
A. I don't know; he was right at the fence. It looked like he came from the west, though.
Q. You brother was east of him?
A. Yes, sir.
Q. When he called your brother a son of a bitch he turned towards him?
A. Yes, sir.
99 Q. As they began talking your brother turned towards him and he shot him?
A. Yes, sir.
Q. Had your brother plowed out to the end of the row before the shot was fired?
A. Yes, sir; right at the end.
Q. Had he started to turn his horse at all?
A. Yes, sir; he had started.

Q. Had the horse turned?
A. No, sir; he just raised to pull the line.
Q. How was your brother plowing with the lines?
A. Had them right around his waist.
Q. Had two lines on the horse?
A. Yes, sir.
Q. With which hand did he pull the line?
A. With the left hand; he started to pull the left-hand line.

Recross examination:

Q. Your brother had the left hand out to pull the horse around, did he?
A. Yes, sir.
Q. And the horse was in kind of a twist, as a horse will do when he is just going to turn around?
A. The horse had turned his head.
Q. Then he had pulled the line, had he not?
A. Yes, sir.
Q. He wasn't in the act of pulling, but he had pulled, and the horse was in a turn?

The DISTRICT ATTORNEY. He said he turned his head.

Mr. BARNES (of counsel for defendant). As he turned there didn't your brother start toward the fence?
A. No, sir.
Witness excused.

100 Dr. GEORGE W. BELL, having been duly sworn upon behalf of the Government, was examined by the district attorney, Hon. James F. Read, and testified as follows, to wit:

Question. Where do you live?
Answer. Okmulgee, in the Creek Nation.
Q. How long have you been practicing medicine there?
A. I have been practicing about 13 years.

Mr. BYERS (counsel assisting district attorney). Were you called to see Charles Hermes on the 8 day of last June?
A. Yes, sir.
Q. Who came after you?
A. Jacob Hermes.
Q. What time of day was it when he came?
A. I think about 2 o'clock; between 2 and 3 o'clock, probably.
Q. How far did you have to go?
A. Between 2 and 3 miles.
Q. At what rate of speed did you go, doctor?
A. I went in a good trot.
Q. What was the condition of Charles Hermes when you got there?
A. He was dead.
Q. Whereabouts was he lying?
A. He was lying in the field.
Q. With reference to a plow where was he lying?
A. His head was lying something near even with the plow, probably a little past the handles.
Q. Was he lying at the back end of the plow or the front end?

A. Behind the handles.
Q. Did you notice the lines?
A. No, sir; there was no lines there.
101 Q. Did you examine his injuries?
A. Yes, sir.
Q. Whereabouts were they?
A. It was between the fourth and fifth rib, on the left side.
Q. What was the injury?
A. A gun shot wound.
Q. How far was it from the heart?
A. It must have passed right through the heart.
Q. You didn't make any post mortem examination, did you?
A. No, sir.
Q. In your opinion, how long could the deceased have lived after receiving that wound?
A. But a very short time; I could not say how long, but about two minutes I suppose would be——
Q. The wound was necessarily fatal?
A. Yes, sir.
Q. Was it a character of a wound in your judgment that the deceased could not have gone or moved far without falling?
A. No, sir; he could not.
Q. Could you form an idea from the size what caliber inflicted it?
A. No; I would judge though from the size of it to be a 44 or 45; something like that.
Q. A man, then, with a ball in that region, a ball of that size, would be likely to expire instantly, would he not?
A. Yes, sir; I suppose so.
Q. Did you probe and ascertain the direction of the wound?
A. No, sir, I did not.
Q. Was he dead when you got there?
A. Yes, sir.
Q. Did you know him in his life time?
A. Yes, sir.
Q. Who was he?
A. Charles Hermes, a son of Jacob Hermes.
Q. Do you know what direction the plow was pointed, whether towards or from the fence?
A. The plow was to the east.
102 Q. How did the corn rows run there?
A. North and south.
Q. How was the plow with reference to the corn rows; was it in the row?
A. It was turned about half way around.
Q. And the deceased was lying behind the plow between the handles?
A. No, sir; a little to the side.
Q. Was the deceased lying on the side next towards the fence or next towards the plow?
A. He was lying on the north side of the plow.
Q. How far from the plow?
A. Probably 2 feet.

Cross-examination by Mr. THOMAS H. BARNES:

Q. The plow was turned about half way around, and pointed towards the east?

A. Yes, sir.

The DISTRICT ATTORNEY. Was the plow pointed due east?

A. I think very nearly.

Q. Which direction was the deceased lying?

A. Lying right here with his head next to the plow, on his back.

Q. And his feet pointing west?

A. Yes, sir.

Q. How far was his head from the plow?

A. I think about 2 feet from the plow.

Q. Was the horse attached to the plow when you got there?

A. No, sir; it was not.

Q. Was the plow down to the turn row, as they call it, in the field?

A. At the end of the row.

Mr. BARNES (of counsel for defendant). He was lying on his back was he?

A. Yes, sir.

103 Q. Who was there with the body?

A. A colored fellow by the name of Miles Surrell was there when I got there.

Q. Anyone else?

A. No, sir; no one else.

Q. The body apparently had not been touched since it had fallen?

A. They told me the body was just as it was when I got there as when it fell, except he had straightened his legs out.

Q. The trunk of the man had not been moved?

A. No, sir; I could not see that it had been moved.

Q. If his legs were straightened out you do not know whether that would be done from the right or left, or how that would be?

A. No, sir.

Q. He laid straight out from the plow, his feet towards the west?

A. Yes, sir.

Q. You say the shot took effect between the fourth and fifth ribs?

A. Yes, sir.

Q. How far to the left of the median line was it?

A. It was at the juncture of the sternum or breastbone.

Q. That would be pretty near the median line?

A. Yes, sir.

The DISTRICT ATTORNEY. Pretty near center, was it, then?

The WITNESS. Probably an inch to the left.

Mr. BARNES (of counsel for defendant). The wound was not probed?

A. No, sir.

Q. The ball didn't go through?

A. No, sir.

Q. That would hardly touch the man's heart, would it?

A. I think so.

Q. Very slightly, would it not?

A. It would strike the apex of the heart.

Q. Do men always fall suddenly when shot that way?

A. No, sir.

104 Q. Or do they sometimes walk for some distance?

A. Some men might walk for some distance.

Q. As a matter of fact, then, taking it from a scientific standpoint, while your idea is from your examination of the injury that the man likely fell about where he was when he was shot, yet, of course, you could not say positive about that?

A. No, sir.

Q. There was no lines about him there when you saw him?

A. No, sir.

Q. The only man you saw there with him was this colored man, and he was there when you got there?

A. Yes, sir.

Q. How near was the dead man to the fence?

A. I think about 10 or 15 feet; probably 15 or 20 feet.

Q. From 10 to 20 feet?

A. Yes, sir.

Witness excused.

Government rests.

105 And the defendant, to maintain the issues upon his part, produced and examined the following-named witnesses: Sarah J. Haynes, Joe Haynes, Willie Haynes, Lizzie Checotah, Amos Gray, William Baxter, James Gregory, Sam Haynes, Sam Checotah, Thomas Thompson (the defendant), who testified, as follows, to wit:

106 *Testimony introduced by the defence.*

SARAH J. HAYNE, having been duly sworn upon behalf of the defendant, was examined by Mr. Thos. H. Barnes, and testified as follows, to wit:

Question. Please state your name to the jury.

Answer. Sarah J. Haynes.

Q. Have you any middle name?

A. Jane is my name; Sarah Jane Haynes.

Q. Are you the wife of Samuel Haynes?

A. Yes, sir.

Q. Do you live near Okamulgee?

A. Yes, sir. I live right in town now.

Q. You have moved to town since this killing up there?

A. Yes, sir.

Q. How far did you live from town at that time?

A. I can't tell you exactly how far; not very far.

Q. You are a citizen of the Creek country, are you?

A. Yes, sir.

Q. Dou 'ou know this defendant, Tom Thompson?

A. Yes, sir.

Q. How old is he, do you know?

A. I don't know anything about his age.

Q. He is not of age, is he?

A. No, sir.

Q. He is charged with the killing of Charles Hermes some time last summer, about the 8th of June. Where were you that day?

A. I was at home.
Q. Where was he living at that time?
A. He was living with us.
Q. How long had he been living with you?
A. About 8 or 9 months.
107 Q. Has he a father or mother living?
A. Yes, sir; he has both.
Q. How far did they live from you?
A. I don't know exactly how far it is.
Q. Have you any idea about how far it is?
A. I am not certain, but it is some distance.
Q. Who else was living at your house at the time?
A. Willie Haynes lived there and Joe Haynes.
Q. What relation were they to your husband?
A. Joe Haynes is his brother, and Willie Haynes is Joe Haynes' son.
Q. Is Willie Haynes of age?
A. No, sir; I don't think he is.
Q. On the day of this killing, I will ask you where your husband was at the time of the killing?
A. He was in town, at Okamulgee, before the supreme court.
Q. Is he an officer of that court in any way?
A. Yes, sir; he is prosecuting attorney of that court.
Q. He was attending the supreme court?
A. Yes, sir; he was just attending court; I don't know whether he had business or not there on that day.
Q. What time of day did he leave home?
A. He went to town early after breakfast.
Q. Did Joe and Willie go anywhere that day?
A. Yes, sir; they went fishing.
Q. Do you know where they went?
A. No, sir.
Q. Did they catch any fish?
A. Yes, sir.
Q. Did they bring any home?
A. Yes, sir.
108 Q. Then your husband went to Okamulgee and Joe and Willie went fishing?
A. Yes, sir.
Q. Who did that leave at the house at that time?
A. It left just myself and Tom there and my little girl.
Q. How old is your little girl?
A. She is 5 years old, going on six.
Q. How many children have you?
A. Just the little girl and this one in my arms. I had another girl, but she is at the mission, or was at that time.
Q. How old is your baby?
A. It is a little over a month old.
Q. The baby wasn't born at that time?
A. No, sir.
Q. How old was the little girl?
A. Five years old.

Q. Now, did you send this boy anywhere that day?

A. Yes, sir; I sent him with some sewing to Mrs. Checotas.

Q. How far is Mrs. Checotas from your house, and which way is it from your house?

A. It is right west from my house, but I can't tell you how far it is.

Q. What did you send him with or for?

A. I sent him with a bonnet for myself and a dress for my little girl.

Q. How did you fix them up to send them?

A. I tied them up in a handkerchief.

Q. Why did you send them to her?

A. We were fixing to go to the mission on Monday, and I wanted them for that purpose.

Q. How did he go?

A. He went on a roan pony.

Q. Do you know what he had been doing during the morning?

A. Yes, sir; we went out berry hunting.

109 Q. Who did?

A. I and Thomas.

Q. Did you get any berries?

A. Yes, sir; some dewberries.

Q. What time did you get back?

A. We got back a little before 12.

Q. Where did you go after berries?

A. Just a little ways from the house out on the prairie.

Q. Did you do anything else that morning?

A. He was out in the garden hoeing after dinner when I called him in and sent him with the sewing.

Q. I suppose he didn't know he was going down there until you called him to go?

A. No, sir; I had not said anything to him about it before.

Q. Did you have any guns on that place at that time?

A. No, sir.

Q. When he went away I believe you said he rode a roan pony?

A. Yes, sir.

Q. Did he take any gun with him when he left the house?

A. No, sir.

Q. Had Joe and Willie got home when he left, or did they come while he was gone?

A. They come after he was gone.

Q. After he left, going to Mrs. Checotas, when did you next see him?

A. I saw him coming home in a run from the field; he rode across right up by the field. I didn't know who it was until he got there.

Q. How did you happen to see him at that time?

A. The horses had got the rope we tied them with around the buggy, and I had gone out to untie them and saw him in the road.

110 Q. You saw him first along the side of the field, I believe you say?

A. Yes, sir; there was somebody else right down below, but I don't know who it was from there, and I could not tell whether they were in the field or outside of the field. He came down and opened the gate and

then he got on his horse again, and at that time I stepped in the house and after a bit I looked out and they were after Tom, and when Tom come up I asked him what he was running the pony so hard for.

Q. Was it before you went in the house that you saw somebody near the gate, or afterwards?

A. Before I went in the house.

Q. Where was Tom when you came out of the house the second time?

A. Right in the yard.

Q. Had he gotten off his horse then?

A. Yes, sir.

Q. Where was Joe and Willie when Tom was coming there on his horse?

A. Joe was in the house and Willie was down at the lot in a trough.

Q. Did you see him in the trough?

A. Yes, sir.

Q. How far is that from the house?

A. Just a little piece.

Q. Was there anything else in the lot besides the trough?

A. There is a creek there.

Q. What is the next you saw of Willie after you saw him in the trough?

A. He came to the house after Tom got there.

Q. Do you know whether he was asleep in the trough or not?

A. He was lying down in the trough when I saw him.

Q. Was there a fence around the yard at that time?

A. They were putting a fence around, but it wasn't finished.

111 Q. Were there any gates there?

A. No, sir.

Q. After he come running by on the horse this boy got up out of the trough about the time Tom came in to the yard?

A. Yes, sir.

Q. When you spoke to him and asked him what he was running the horse for you had been in the house and came to the door?

A. Yes, sir.

Q. You had first gone out to look after these horses?

A. Yes, sir.

Q. Where were the horses?

A. Standing right in the yard.

Q. How many horses were there?

A. Two horses.

Q. How were they fixed?

A. Tied together with a rope. We had tied one horse to an old house to keep it from running away.

Q. They got round the buggy; where was the buggy?

A. In front of the house.

Q. Which way was the tongue of the buggy?

A. Towards the east.

Q. Did you release the horses when you went out there?

A. No, sir; I saw somebody come a running, and didn't know what was the matter, and thought maybe Sam's mother had got sick and sent for us.

Q. What did he do after he got there?

A. He got off his horse, unsaddled it, and saddled the other horse and rode off.

Q. What saddle did he put on the other horse?

A. I never noticed what saddle, but there was a saddle in the yard there, and he put it on the horse and rood' off.

112 Q. What kind of a saddle was it he rode before?

A. It was a man's saddle, but I don't know which one it belonged to, but he left it there.

Q. He left the one there that he was riding the pony with?

A. Yes, sir.

Q. And took another saddle that was there in the yard?

A. Yes, sir.

Q. Did he have any arms with him when he came back there?

A. Yes, sir.

Q. What did he do with them?

A. He got down and went and put the gun in the buggy.

Q. Did he hand the gun to Willie Haynes or to you?

A. No, sir; he got off of his horse and put the gun in the buggy.

Q. Who bridled the other horse?

A. He bridled it.

Q. Which way did he go then?

A. He rode off towards town. I though the was going to town. He started off across the prairie.

Q. What became of that gun?

A. I don't know; it was in there when he went off.

Q. Was it taken in the house afterwards; do you know whether it was or not?

A. Yes, sir; it was in the house afterwards, but I don't know who brought it in.

Q. Do you know who that gun belong' too?

A. It belonged to Amos Gray.

Q. How do you know?

A. The defendant told me so.

Q. We do not want your conversation with the defendant, but you know the gun did not belong there, and when he left your house

113 there that day he didn't have a gun, and came back with one?

A. Yes, sir.

Q. When he went away the second time he didn't take the gun with him?

A. No, sir.

Q. Did he have any arms?

A. No, sir; not that I saw.

Q. What was the color of the horse that he rode off at that time?

A. Black horse.

Q. How long had you had that horse?

A. I could not tell you exactly how long we had him.

Q. Was that the horse you had tied to the other horse?

A. Yes, sir; the black horse was.

Q. You spoke of seeing a man, before you went in the house, get down at the gate, go out, and then get on his horse again. Did you see any other man there at that time?

A. Yes, sir; I saw another man there.

Q. Tell us who it was?

A. I never noticed.

Q. What was done? What became of the first man who came out there?

A. He came about half way to the house, and then he turned and went the direction that Tom was going.

Q. Was there a road that crossed the road that Tom would go from the gate to the house?

A. Yes, sir.

Q. How near did the other man go to the house?

A. I could not tell you exactly how near.

Q. Do you know how near he was to the road across the one that Tom would go?

A. No, sir.

Q. Any way, you think that he came about half way to the house?

A. Yes, sir.

114 Q. After he come half way to the house what did he do?

A. He turned and went the other way.

Q. Did he stop anywhere or did he just keep right on?

A. He stopped there a while.

Q. Did he seem to be watching Tom?

A. I could not t'll what he was doing. He come a certain distance there and halted, and then went in the same direction that Tom had gone.

Q. Was the man who came down there near the gate walking or riding?

A. He was riding.

Q. How long after he went away from your house the second time was it before your husband came home?

A. It wasn't very long.

Q. Did you see anybody come from in the direction of Mr. Hermes house and hand Mr. Hermes a gun or anything of that kind?

A. No, sir.

Q. If anybody came and handed him a gun, you didn't see that?

A. No, sir.

Q. Could you tell at that distance who that man was that halted there?

A. No, sir.

Q. I suppose you know old man Hermes and his son?

A. Yes, sir.

Q. Did the man stop any place or did he keep right on?

A. He kept right on as far as I could see him.

Q. After he came out to the gate did he stop any other place except the one place you have mentioned?

A. No, sir; he didn't.

Q. You saw him after he started on in the direction he was going?

A. Yes, sir.

Q. As he went on there did you see any man come up to him

115 and give him a gun?

A. No, sir.

Q. It was prairie there, and you could see a good distance?

A. Yes, sir.

Q. If anything of that sort happened there you did not observe it?
A. No, sir.
Q. You were looking at him, though?
A. Yes, sir.

Cross-examination by the DISTRICT-ATTORNEY:

Q. What is your husband's name?
A. Sam Haynes.
Q. Is he a witness here?
A. Yes, sir.
Q. Is the defendant any relation of yours?
A. No, sir; but he is my husband's first cousin.
Q. Was he working at your house at that time?
A. Yes, sir; whenever we had any work to do we would get him to do it.
Q. What field did you mean that you saw this man in?
A. The field that Mr. Hermes was cultivating.
Q. Mr. Hermes is the father of the boy that was killed, is he not?
A. Yes, sir.
Q. What time was it that you sent Tom to Mrs. Checotas with that sewing?
A. I do not know exactly what time it was, but it was afternoon.
Q. How long was he gone?
A. I can't tell you how long he was gone.
Q. After he left the house the first you saw of him was when he galloped up from the field?
A. Yes, sir.
116 Q. Where were you at that time?
A. I was standing out on the porch.
Q. How close to your house was he when you saw him?
A. I cannot tell you.
Q. Did you stay there after he came up?
A. No, sir; I went back in the house and came out again.
Q. How close was he to your house when you went back in the house?
A. He was pretty close, but I can't say how close.
Q. Was he about as far from the house as from here to Garrison avenue (distance of about a block and a half)?
A. Yes, sir.
Q. That is, when you turned to go in the house?
A. Yes, sir.
Q. Who else did you see before you went in the house?
A. I saw somebody else coming on horseback.
Q. Where were they?
A. In the field that Hermes was working.
Q. Were they outside of the gate when you turned and went into the house?
A. They had turned to go when I went into the house.
Q. They had gotten outside of the field, then?
A. Yes, sir.
Q. How far outside?
A. Not very far.
Q. Was it as far as across this room from the gate?

A. I reckon it was that far.
Q. Was he on his horse or off of it at that time?
A. He got on his horse after he got out of the gate and shut it.
Q. Did you go in the house just after he got on the horse?
A. Yes, sir.
117 Q. Was Thompson running the horse when you saw him?
A. Yes, sir.
Q. Had you heard the shot down there?
A. No, sir.
Q. Thomas Thompson was nearly to your house when you turned to go in?
A. Yes, sir.
Q. And this other man was just outside of the gate?
A. Yes, sir.
Q. When was the next time you saw Thomas Thompson?
A. He was right in the yard.
Q. Had he gotten down *of* off his horse?
A. Yes, sir.
Q. Where were you then?
A. I had come to the door.
Q. Where was this other man then?
A. He was down about half way from the house to the field.
Q. What was he doing?
A. Just sitting on his horse.
Q. Was he near this road that goes to Okmulgee?
A. Yes, sir.
Q. Right at the road was he?
A. I don't know whether he was right at the road or not, he was near to that road.
Q. What did Thomas Thompson do then?
A. He saddled another horse and road off.
Q. Did he ask you to let him have the horse?
A. No, sir.
Q. Didn't ask you anything about it?
A. No, sir.
Q. What kind of a horse did he saddle?
A. Black horse.
Q. Was that a new horse or an old horse?
A. New horse.
Q. Did the defendant at that time ride down towards man sitting on his horse?
A. No, sir.
Q. What direction was that man from your house?
A. It was west, and the defendant rode off south.
118 Q. What did the man on the horse do?
A. He turned and went the same direction that the defendant was going.
Q. How far was he from the defendant?
A. I don't know how far, may be a quarter of a mile.
Q. They both rode in the same direction, did they?
A. Yes, sir.

Q. And that is the last you saw of them?
A. Yes, sir.
Q. Where was Joe an' Willie when the defendant came up there?
A. Joe was in the house and Willie was down in the lot.
Q. Who were they?
A. Joe Haynes is Sam Haynes' brother and Willie Haynes is Joe Haynes' son.
Q. Where was Joe when the defendant came up?
A. Joe come out, he was standing out in front.
Q. You say the defendant didn't give either one of them a gun?
A. No, sir; he put it in the buggy.
Q. You didn't see anybody else on a horse, did you?
A. I saw somebody come out of the gate, but I don't know which way they went, because I didn't notice them.
Witness excused.

119 JOE HAYNES, having been duly swo'n upon behalf of the defendan', was examined by Mr. Thos. H. Barnes, through interpreter Perryman, and testified as follows, to wit:
Question. Tell him to give his name?
Answer. Joe Haynes.
Q. Ask him if he knows the defendant?
A. Yes, sir.
Q. Is he any kin to him?
A. The defendant is his uncle's son.
Q. Then he is a cousin to him?
A. Yes, sir.
Q. Ask him if he knows how old the defendant is?
A. He says he don't know for certain.
Q. Ask him where he was the morning of the day that Charles Hermes was killed?
A. He went fishing, he says.
Q. Was anybody with him?
A. Him and his son went fishing.
Q. Did he catch any fish?
A. Yes, sir.
Q. Did he take any home with him?
A. Yes, sir; brought them home.
Q. What time of day did he get back home?
A. He says he don't know for certain.
Q. Was this defendant there when he came back, or not?
A. When he first came he wasn't there, but came back soon afterwards.
Q. Where was he and Willie Haynes when this boy came back?
A. He was there at the house on the porch, and Willie was down in the lot in a trough asleep.
Q. Tell him to describe what occurred when the defendant came up there.
A. He said the first he seen of him he was on a horse and came
120 running up the field fence, and there was somebody else come running on behind. He said that the fellow that was coming on behind him stopped, and Thompson came on to the house.

Q. How far from the field did the fellow that was behind him stop?

A. He said he come about half way from the field to the house and stopped.

Q. What did the defendant do after he got into the yard?

A. He came right on into the yard, and he had a gun, and he stuck it into the buggy, and saddled another horse and got on it and left.

Q. Where was that other horse; where did he get it?

A. The horse was standing there with a rope wrapped around a buggy tongue, and he took one of them.

Q. How many horses were there wrapped around the buggy tongue?

A. There was two horses tied together.

Q. Which did he take?

A. A kind of a brown horse.

Q. What saddle did he use? Ask him if he had any saddle on the pony.

A. He says he is not very certain whether the horse he was riding before that was saddled or not.

Q. Did he put a saddle on the brown horse?

A. Yes, sir.

Q. Where did he get that saddle?

A. The saddle was setting out in the yard and he went and got it and saddled the brown horse.

Q. Did anyone help him?

A. No, sir; he done it himself.

Q. When he went away did he have any weapons with him?

A. No; he didn't have any arms.

Q. Which way did he go?

A. He went towards Okmulgee.

Q. What became of the man who was following, and who stopped down there about half way?

121 A. He says he don't know exactly; he don't know whether he went back or what he done.

Q. Did anyone go to that man down there and take him any gun, or does he know, *or does he know* whether he had a gun or not?

A. He don't know.

Q. Did anybody go to him?

A. No, sir; he didn't see anyone go to him.

Q. And he don't know what become of the man that was *down* there?

A. He don't know what became of him, whether he went back or not.

Cross-examination by the district attorney:

Q. What direction did that man go that was standing on his horse there when he saw Thompson coming up there?

A. He says he don't know.

Q. He don't know what became of him?

A. No, sir.

Witness excused.

122 WILLIE HAYNES, having been duly sworn upon behalf of the defendant, was examined through Interpreter Perryman by Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. Ask him his name?

Answer. Willie Haynes.

Q. How old is he?

A. He says he don't know.

Q. Is he the son of Joe Haynes, that was in here just now?

A. Yes, sir.

Q. Ask him where he was living at the time that Charles Hermes was killed?

A. At Sam Haynes's.

Q. How long had he been living there?

A. Ever since he was small.

Q. Ask him where he was in the morning of the day this killing took place?

A. He says he went fishing.

Q. Who with?

A. His father.

Q. Ask him where the defendant was when he went fishing?

A. He was at the house.

Q. Ask him if he was at the house when he came back, or where he saw him next?

A. No; he wasn't there.

Q. What did he do after he came back?

A. He said after he got back he had his dinner, and went to sleep out in the lot in the horse trough.

Q. What caused him to wake up?

A. The defendant was riding up, and the horse running waked him up.

Q. How near did the horse run to where was sleeping?

A. Just a little from there where he was then across the building.

Q. What did he do then?

123 A. He waked up and seen the defendant running the horse, and he got up and started up to the house.

Q. Then ask him what happened after that; what the defendant did, and what became of him?

A. He seen him ride up there and jump off.

Q. What did he do after he jumped off?

A. He had a gun, and he went and shoved it in the buggy.

Q. Then what did he do?

A He went in the house; he had a new pair of boots in the house, and he went in and put them on, and then he saddled up and rode off.

Q. How long did it take him to do all that?

A. Not very long; he could not tell just how long.

Q. Did he take any arms away with him when he went, or did he leave them there?

A. No; he didn't take any arms with him.

Q. What horse did he ride away?

A. The brown horse.

Q. What saddle, if any, did he get?

A. He says, "My father's saddle was right in the yard, close to the buggy, and he went and got that, and saddled up the horse, and rode off."

Q. Did he see anybody following this boy as he came from the field, or about the time he got up there?

A. He said he didn't see anyone running after Tom, but they told him——

Q. Did he see any other man out on the prairie on a horse?

A. He seen a man going back on a horse.

Q. Going towards Tom, or how?

A. He said he was going back towards the field, but there was brush shed stood off that way from the field, and he was going towards that.

Q. He saw the man going towards the brush shed?

A. Yes, sir.

Q. How long was that after Tom had started?

A. He said Checotah lived off about half a mile, or maybe not
124 so far, and Tom hadn't got by his horse yet when he saw this man.

Q. Is that the way Tom was going, in that direction?

A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. What direction did Martin Checotah live from Sam Haynes's?

A. South.

Q. What direction is that shed from Sam Haynes's?

A. It is southwest.

Q. He was asleep when Thompson came up there, was he not?

A. Yes, sir; he was asleep.

Q. The defendant was in the yard before he saw him, was he not?

A. No, sir; he saw him before he got in the yard.

Q. He had passed him before he saw him, had he not?

A. Yes, sir; he had passed him.

Q. Going towards the house; he was between the stable lot and the house when he saw him, then?

A. Yes, sir.

Q. How close to the house?

A. Just as far as across this room here.

Witness excused.

125 LIZZIE CHECOTAH, having been duly sworn upon behalf of the defendant, was examined through Interpreter Perryman, by Mr. Thomas H. Barnes, and testified as follow', to wit:

Question. Ask her her name?

Answer. Lizzie Checotah.

Q. Is she a Creek Indian?

A. Yes, sir.

Q. How far does she live from Sam Haynes's?

A. About 2 miles.

Q. Does she know the day that Charles Haynes was killed up there last summer; did she hear of it?

A. Yes, sir; she heard of it.

Q. Ask her if on the day of the killing she saw the defendant?

A. She says she don't know whether it was on the same day, but the defendant came there to her house, and she heard of the killing the next day after he was at her house.

Q. What was the defendant's business at her house?

A. She says he brought her some sewing from Sarah Haynes.
Q. What did he bring her?
A. One was a bonnet, and the other was a little dress.
Q. How did he come there?
A. Riding a horse, a roan.
Q. How was the sewing fixed up?
A. It was tied up in a handkerchief.
Q. She may state what time of day it was when he came there, if she knows?
A. It was in the afternoon about 2 o'clock.
Q. Did he get off his horse there?
A. No, sir.
Q. Did he have any gun with him?
A. No, sir.

Q. Which way did he go from there?

126 A. He went right back the way that he come there.

Q. Does she know where Amos Gray lives with reference to that direction, whether he went in that direction or not?
A. He come right back the way that he come from, she says, and she says that Amos Gray is opposite of Sam Haynes's house.
Q. Does she know how far Amos Gray lives from her place?
A. It is a little over three miles.
Q. Ask her if she knows anything about miles or distances?
A. No, sir; she does not know how far a mile is, but that is what they call it.
Q. Does she mean from her house or from Haynes's?
A. From her house to Amos Gray's.
Q. Ask her if she did not tell us it was about a mile and a half from her house to Amos Gray's?
A. She said that is what others said.
Q. Ask her if it is not called about that by the people?
A. She says that is what the people around there call it.
Q. Ask her if there is a little lake or anything of that sort there, near her?
A. Yes, sir; there is a lake there in the bottom.
Q. How far is the lake from her?
A. It is right close, but she don't know how far.
Q. Does she know whether this defendant went back a little ways, the way he was coming, and then turned around that lake towards Amos Gray's or not; but let that pass, and we will show it by another witness, the directions, etc.
Cross-examination waived.

127 AMOS GRAY, having been duly sworn upon behalf of defendant, was examined through Interpreter Perryman by Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. Ask him if his name is Amos Gray?
Answer. He says, yes, sir.
Q. Ask him if he knows this defendant?
A. Yes, sir.

Q. Is he any a kin to him?
A. They are cousins.
Q. How far does he live from this boy's mother?
A. They lived on the North Fork and he lived at Okmulgee.
Q. How many miles is that?
A. He says he don't know.
Q. Ask him where he was on the day that Charles Hermes was killed?
A. He says he was at work in the field.
Q. What field; how near to his house?
A. Well, he says he don't know how far it is, but then it is called a mile from his house.
Q. Who was working with him, if anyone, on that day?
A. Him and his wife and his stepson were working together in the field.
Q. Was there any one else out there with them?
A. He said there wasn't any but them three, but in the morning a couple of boys came there, and said they were going fishing, and dug worms.
Q. What boys were they?
A. It was Willie Haynes and Joe Haynes.
Q. Did he have a little girl there?
A. Yes; sir; his little girl was there.
Q. How old was she?
A. About five years old.
Q. What time of day did she leave home to go to work in the
128 field?
A. He says he don't know what time of day it was, but it was in the morning.
Q. When did he get back home that day?
A. Late in the evening.
Q. Did they all stay out there in the field all day?
A. Yes, sir; they were all out there until evening.
Q. How far does he live from Lizzie Checotah's?
A. He says he don't know how far, exactly, it is. He says he guesses it is about 2 miles.
Q. Ask him if he owned any guns or pistols at the time we are speaking of.
A. He said he didn't own any pistol, but he owned a gun.
Q. Ask him where his gun was the morning that he went out to the field to work.
A. He had it on a rack, just above the door.
Q. What sort of a gun was it?
A. A 44 square-barreled Winchester.
Q. Ask him if he saw the defendant on that day?
A. No; he never saw him.
Q. Ask him if he missed his gun about that time, and what became of it?
A. He said he got home that evening and went in the house and never paid any attention to the gun or anything, and got a sack and went on to

Okmulgee, and when he got back from Okmulgee his wife told him about this fellow being killed; and then he missed his gun, after he heard about the killing. He was also informed where his gun was left at.

Q. Where did he get the gun after that?

A. At Sam. Haynes's.

Q. Was there any cartridges in the gun before it was missed?

129 A. He said the evening before his stepson said he wanted to go out squirrel hunting, and he put three cartridges in his gun, and he went out, and he seen no squirrels; didn't shoot it; brought it back with these cartridges in it.

Q. In the magazine, or was one of them in the barrel?

A. There was one in the chamber and two in the magazine. He says he put them in there himself the evening before.

Q. Does he know whether they were fired off or whether they were left in the gun?

A. He says there wasn't any of them shot out.

Q. How long before he got his gun?

A. He says he don't know, exactly; but he thinks it was about three days.

Cross-examination by the district attorney:

Q. How does he know there wasn't any of these loads shot out?

A. He said he didn't go far; went right down to the bottom, and was'nt gone very long, and he came back, and he asked him if there wasn't any squirrels, and he said he didn't see any.

Q. All he knows is what the other man told him?

A. Yes, sir; all he knows is what his stepson told him.

Q. Who was at the house while he was working out in the field?

A. There wasn't any one.

Q. No one at all?

A. No one at all.

Q. Ask him if it is not three miles from his house to Lizzie Checotah's?

130 A. He says it may be; but he don't know how far a mile is, exactly.

Q. Ask him if it is cal'ed three miles?

A. He says he don't know.

Q. Ask him what direction he lives from Lizzie Checotah's?

A. He lives southeast.

Q. What direction does he live from Sam Haynes'?

A. South.

Q. How far?

A. About a mile is what they called it.

Q. Ask him if he knows where old man Hermes' boy was killed that day?

A. He says he knows where the field is, but he do' not know right where this boy was killed.

Q. Ask him what direction he lives from that field?

A. South.

Q. How far?

A. He guesses it is about a mile.

Redirect examination by Mr. THOMAS H. BARNES:

Q. Ask him what direction he lives from the place where old man Hermes lives—not from the field that he cultivated, but which way he lives from old man Hermes' house.

A. He lives south of west of old man Hermes's place.

Witness excused.

131 JOE HAYNES, having been duly sworn upon behalf of the defendant, and having been once examined, was recalled and reexamined through Interpreter Perryman, by Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. Ask him if he knows whether this roan pony that the defendant was riding that day was lame or not?

Answer. Yes, sir; he was lame.

Witness excused.

132 WILLIE HAYNES, upon being recalled, was examined through Interpreter Perryman, by Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. Ask him if he knows whether there was anything the matter with that roan pony that this defendant was riding?

Answer. He was a little lame, he says.

Witness excused.

133 WILLIAM BAXTER, having been duly sworn upon behalf of the defendant, was examined by Mr. Thomas H. Barnes and testified as follows, to wit:

Question. Where do you live?

Answer. I live in the Creek Nation.

Q. Where abouts?

A. Near Okmulgee, about fifteen miles from Okmulgee and north of it.

Q. Do you know old man Hermes?

A. Yes, sir.

Q. Did you know his son Charles, who was killed?

A. I saw him a couple or three times before he was killed.

Q. Where were you living at that time?

A. I was living w'ere I am living now, north of Okmulgee.

Q. Where were you on the day of the killing?

A. I was in Okmulgee.

Q. Did you see Mr. Sam Haynes there in Okmulgee?

A. Yes, sir.

Q. If you saw old man Hermes that day, when did you first see him? Did you get with Sam Haynes that day and go anywhere with him?

A. No, sir; we were in town together that day; I seen him in town.

Q. Where did you go that evening?

A. As I was starting out home, Mr. Haynes was standing at the blacksmith shop, and said to wait a moment or two and he would go with me.

Q. You got together there?

A. Yes, sir.

Q. Did your road lead in the direction of where he lived in going home?

A. Yes, sir.

Q. Did you start out of town together?

A. Yes, sir.

134 Q. Who else was along?

A. James Gregory and my little boy about 5 years old, and that was all.

Q. How were you travelling?

A. In a hack.

Q. Whose hack was it?

A. Mine.

Q. Did Mr. Haynes come out in your hack?

A. Yes, sir.

Q. The road you travelled lead near his house?

A. Yes, sir.

Q. Did you see old man Hermes there anywhere?

A. Met him, I reckon, about 200 yards after we left, riding on his horse, and he had his gun in his hand when I first noticed, and begin to talking, and he said to Sam Haynes, "You go off and leave them boys, and they come to my field and shoot my boy," and Sam said, "What? What?" and he made the same remark again, and Sam started to get out of the hack, started towards the old man, and he held his gun in his hand this way [indicating] and Haynes got back in the hack. When he got in the hack the old man started on into town, I suppose. We got up to Mr. Haynes' house; I went on up to the house with him.

Q. Did Mr. Haynes get you to go somewhere?

A. He asked me if I would not go down in the field and tell Mr. Hermes if he wanted that boy caught he would send——

The DISTRICT ATTORNEY. I object to that.

The COURT. That is not competent.

Mr. BARNES (of counsel for defendant). After you got down there what passed between you and the old man, if anything, on that subject; if there was anything else said there by the old man with regard to anything that occurred between the boy and himself and his boys previous

135 to this time, tell what it was. Did he say anything about a difficulty that occurred there near the gate?

A. He said the boy passed the field, and they had a difficulty. I asked him what caused this boy to get killed, and he said the boy was passing down, going down the fence, and they stopped him, and had words with him, called him, I think, a liar, or something, and if you come down there and steal any more of my hogs we will flog you, or something that way, and the boy went on down by them, and he said he come back directly with a Winchester and rode up and stopped, and he said his boy said something to him, but he did not understand what, and turned around from his plow to throw his lines, and started towards him, and then this boy shot his boy, and he said this defendant pointed the gun at him, and he got on his horse and rode off as fast as he could go.

Q. Did he say anything as to what the boy did with his gun after he got home?

A. Yes, sir; he said there was two men and a woman standing in the yard and they came and got the gun and taken it in the house, and they stood there and talked awhile—he supposed they were talking—and the defendant got on a different horse and then he cut off across the prairie.

Cross-examination by the district attorney:

Q. How long had you known old man Hermes?

A. I never did have any acquaintance with him to amount to anything. I think in February was the first time I ever saw him.

Q. You were a stranger to him when you went down there?

A. Yes, sir.

Q. Who else was there when you were?

A. Dr. Bell was there.

136 Q. Was he there when this conversation occurred?

A. Yes, sir.

Mr. BARNES (of counsel for defendant). Where was this boy lying when you got there?

A. Lying on his back.

Q. With reference to the plow or the fence?

A. He was about ten or fifteen steps from the fence?

Q. Did anybody step the distance?

A. Not that I know of.

The DISTRICT ATTORNEY. How far from the plow was he lying?

A. I don't recollect of noticing the plow.

Q. Dr. Bell heard the conversation between you and Hermes, did he?

A. I don't know whether he did or not.

Q. He could have heard it, could he not?

A. He was examining the boy.

Q. How far was the old man from the boy?

A. He was just walking around among the crowd where we were; he was there in the crowd.

Q. Who else was there?

A. There was no one else there that I knew the names of at all, only Jim Gregory.

Q. Did Jim Gregory hear the conversation?

A. Yes, sir.

Q. How do you know he heard it?

A. He was standing there.

Q. How do you know Dr. Bell did not hear it?

A. I don't know whether he heard it or not?

Q. He was close enough to hear it, was he not?

A. Yes, sir.

Q. Who else was there?

A. There was some colored people there, but I don't know who.

Q. You don't know where the plow was?

A. No, sir.

Q. What was it old man Hermes said to you about the boy?

A. I asked the old man what caused this defendant to go there and kill his boy, and he said he was passing and his boy spoke to him,

137 and accused him of stealing their hogs, and called him a son of a bitch, and told him if he stole any more hogs——

Q. The old man told you they called him a son-of-a-bitch?

A. Yes, sir; and he said something to his boy, and he did not understand what it was, and his boy said something to him, and his boy turned around in his plow, throwed his lines, and started towards him, and then he shot him.

Q. You are willing to swear to that, are you?

A. Yes, sir.

Q. Where are you from?

A. Missouri.

Q. How long have you been from Missouri?

A. I have been away from there about 2 years?

Q. Were you raised in Missouri?

A. Yes, sir; in Green County.

Q. Did you go from Green County down to the Creek country?

A. I went down to the Sac and Fox country, and then to the Creek country.

Q. When was that?

A. It was last April, two years ago.

Q. Were you ever arrested for anything?

A. No, sir.

Q. The old man Hermes told you what you have stated here, did he?

A. Yes, sir.

Witness excused.

138 JAMES GREGORY, having been duly sworn upon behalf of the defendant, was examined by Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. What is your name?

Answer. James Greggory.

Q. Do you know the time that Charles Hermes was killed up near Okmulgee?

A. Yes, sir; about the time?

Q. Were you at Okmulgee that day?

A. Yes, sir.

Q. Who was with you?

A. William Baxter.

Q. How were you travelling?

A. In a hack?

Q. Did you see Sam Haynes that day?

A. We got with him in Okmulgee, and were there all that day. And Mr. Baxter and Mr. Haynes and myself all started out of town in a hack, in Baxter's hack.

Q. Did you and Baxter live neighbors?

A. I lived with him.

Q. Did you see old man Hermes after you started out?

A. Yes, sir; just as we were going out at the edge of town. He rode up and kind of passed the hack on our left, and then sorter checked and said to Sam Haynes: "Ain't it a pretty come off for you to have your boys to kill my boy to-day?" and Sam said "What! What!" two or three times, and then Mr. Hermes repeated it the second time, and then Sam he got out of the hack and started back towards him.

Q. Sam didn't have any arms, did he?

A. No, sir; Sam started towards him, and Baxter told Sam to get back in the hack. The old man had a gun, and he got back in the hack, Sam did, and then we drove on.

139 Q. Did you go down to where the boy's bod' was in the field?

A. Yes, sir.

Q. If the old man made any statement to you about the occurrence between himself and his boys and the defendant about the killing, just tell us what he said at the body.

A. He said when the defendant passed the field that his boy stopped him and told him not to go down there and kill any more of the hogs; kill or steal any more of their hogs, I believe it was, I won't be positive, with an oath to it; I think he said "God damn you, don't you go down there and steal any more of our hogs." That is about all the old man said about what occurred, as the boy went down.

Q. Did he say anything about what occurred, what this boy did, when he came up there and the shooting occurred, and what his son did?

A. He said he could not understand what they said, but there was words passed between the boys, and that this boy rode up close to the fence and said something to his boy, and his boy got out and turned and said something to him, started towards him, throwed his lines, and that he shot him then. That is about all I remember about it.

Q. How long have you lived up there?

A. Ever since about the first of March past.

Q. Where are you from?

A. From this State; Scott County.

Q. You went from Scott County up there?

A. Yes, sir.

Q. How far did you and Mr. Baxter live from Okmulgee?

A. Fifteen miles.

Cross-examination by the DISTRICT ATTORNEY:

Q. How long had you known old man Hermes?

140 A. I never had any acquaintance with him. I saw him when I would go up around there.

Q. Was Baxter acquainted with him?

A. I could not tell you whether he was or not.

Q. How long have you known Sam Haynes?

A. He is the first man that I met up with, or got acquainted with at Okmulgee, about the first of March or last of February.

Q. Were you living on Hayne's place?

A. Yes, sir. Baxter was, and he is now. I have been on a visit down in Scott.

Q. What was it the old man said to Baxter?

A. Baxter asked him what caused this, and the old gentleman explained when the boy passed the field down by the field that his boy spoke to him and told him not to come down there and kill or steal any more of their hogs, and cursed him; and he said the boy went off a little piece, and then after sometime he came on back and rode up, and about this time his boys was plowing, going out at the end close to the fence, and the boy

Thompson, the defendant, said something to the boy that was killed, and then Hermes said something to him, but the old man said he could not understand what, and then the boy shot him.

Q. That was all, was it?

A. Yes, sir; and he started towards him from the plow.

Q. Why did not you put it all in at first? Now, didn't the old man say that Charley Hermes started to get a gun?

A. No, sir; I didn't understand it that way.

Q. And didn't he say that he had a gun setting down in the
141 corner of the fence?

A. No, sir; I didn't understand it that way if he did.

Q. You are certain that he said Charley Hermes started toward him?

A. Yes, sir.

Q. You were standing there listening to him?

A. Yes, sir; he was talking to Baxter.

Q. You were listening?

A. Yes, sir.

Q. You didn't hear anything about a gun?

A. No, sir.

Q. The boy was lying there dead in the field, was he not?

A. Yes, sir.

Q. Was Dr. Bell there?

A. Yes, sir.

Q. Old Man Hermes was talking loud, and anybody could hear him, couldn't they?

A. I should think they could.

Q. Standing by the body of this boy, was he not?

A. Well, tolerable close

Q. The doctor was there?

A. Yes, sir; the doctor was there examining the body.

Q. How far was the body lying from the plow?

A. I don't remember noticing the plow, or how it was.

Q. Was he lying on his back or face?

A. Back.

Q. Which way was his head pointed?

A. Eastward; a little northeast.

Q. How far was the body from the fence?

A. Well, I should judge some 15 or 20 feet, maybe.

Redirect examination.

Q. Where were you subpœnaed?

A. Near Waldron, Scott County.

Q. You don't live up there in the Indian country now?

142 A. No; I was down in Scott County on a visit.

Q. Your home is in the Territory, is it?

A. No, sir; it is down here.

Q. You stated you were home on a visit; what do you mean by that?

A. I moved down there, but I think of going back.

Q. You will go back to the Territory?

A. Yes, sir; that is my intention now.

Witness excused.

143 SAM. J. HAYNES, having been duly sworn upon behalf of the defendant, was examined by Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. Your name is Samuel J. Haynes?

Answer. Yes, sir.

Q. How far did you live from Okmulgee at the time that Charles Hermes was killed?

A. I guess it is about a mile and a half; I am not positive at all.

Q. Was old man Hermes renting land from you?

A. Yes, sir.

Q. How long has he lived on your land, or does he live there yet?

A. No; he does not live there now; he moved away from there very lately—in this month.

Q. He has lived there from the time his son was killed to within this month—or, November, rather, because this is the first of December?

A. Yes, sir; in November.

Q. Where does he live now.

A. He is living six miles on the other side of Okmulgee, east of Muskogee.

Q. How long did he live in your place?

A. About 2 years.

Q. How far is it from this gate [indicating on diagram] up to your house?

A. About three-quarters of a mile.

Q. That is from the gate in the field where the killing occurred to your house?

A. Yes, sir.

Q. It is about a quarter of a mile from the field where the killing occurred across to where Mr. Hermes lived?

A. Yes, sir.

Q. Which way did he live from that field?

A. South.

Q. What direction is Okmulgee from that field gate?

A. Southeast.

144 Q. How far is Okmulgee from there?

A. I guess it is about two miles, maybe.

Q. Is it further from there to Okmulgee than it is from your house to Okmulgee?

A. Yes, sir.

Q. How far did Mrs. Checotah live from your house?

A. About two miles.

Q. How far is it from Mr. Checotah's place to Gray's, about?

A. I don't know; but it is hardly two miles though.

Q. About how far is it from your house to Amos Gray's?

A. About a mile, I suppose.

Q. Any way, in going around from Amos Gray's back you would have to go around the corner of this little field, and that is about the direction you would go to go to your house?

A. Yes, sir; there is several roads meet in this flat [indicating on diagram].

Q. On the day this killing occurred where were you?

A. I was attending court at Okmulgee, supreme court.

Q. What time did you go to town?

A. In the morning before 9:00 o'clock; I had to be there at the court.

Q. What time did you leave town?

A. I left town I guess it was about 2 o'clock in the evening.

Q. How did you travel in going to town?

A. I went in a buggy, in another's buggy, and he sent the buggy back, and I thought I would have to stay all night there; my case wasn't going to come up that day, and Mr. Baxter happened to be there with a hack. One of the judges staid with me the night before, and went to the court that morning in the buggy with me. I met Baxter and Gregory in town and I went out with them.

145 Q. Did they live on your lands?

A. Yes, sir.

Q. How far from you?

A. I think about 15 miles from Okmulgee.

Q. Did you meet old man Hermes?

A. Yes, sir.

Q. Whereabouts?

A. Just going out of town; just at the edge of town; pretty near.

Q. You met him there and passed him, and certain things occurred, and you went on home?

A. Yes, sir.

Q. If you learned of the killing, from whom did you learn of it?

A. From old man Hermes.

Q. You had some talk with him there, then?

A. Yes, sir.

Q. After you went home, did you go down to the field with these other parties, or did Baxter and Gregory go without you?

A. They went. I sent these two men down there to tell the old man——

The DISTRICT ATTORNEY. I object to that.

Mr. BARNES (of counsel for defendant). Why didn't you go down?

A. Because I just didn't have the time to go down there.

Q. Had the old man talked rough to you up there?

A. When I met him he talked with me, and he said, "One of your boys killed my boy right behind the plow." He had his gun in his hand. I got out of the hack, and was going to him to talk to him, and Baxter called me back, and I got back in the hack.

Q. When you got home these men went down there, and you did not?

A. Yes, sir.

Q. Shortly before this time, I will ask you, if you and Sam Checotah were at the old man Hermes's house. and if when there the old man said anything to you in the hearing of Checotah in the way of a threat to this boy; and, if so, what it was?

146 A. Yes, sir. I was down there, and I had this Thompson and Willie Hayn's working on the fence, setting posts there, and they were fencing the field there, and I went down there to see about it, and when I was down there the old man Hermes told me that if I didn't drive that boy away, or if he come around there acting the monkey any other time, he would knock his head open, and he asked me to drive him away

first from my house, and I told him that I did not intend to do that. He done no harm to me, and he said, "All right, but then he must stay away from here, and not be acting the monkey, and if he does that any more I will chop his head open," and I told Hermes I would talk with the boy, and I did, and I told him not to go around there any more, and he never did go around there.

Q. How long was that before this?

A. I don't recollect.

Q. You told him not to go around that place any more?

A. No, sir; I told him not to go around there any more.

Q. Have you any position there in your own country, any office, or anything?

A. Yes, sir.

Q. What is it?

A. District attorney and interpreter for the house of warriors, they call me.

Q. You are prosecuting attorney in the Creek court?

A. Yes, sir.

Q. Did you have any guns about your place at that time?

A. No, sir.

Q. After this killing, did you see a gun there of Gray's or anybody else?

A. Yes, sir; when I got there they told me that the gun was there that belonged to Gray.

Q. But you didn't have any guns about your place?

A. No, sir.

147 Here court adjourned until to-morrow morning, 8:30 o'clock.

SATURDAY MORNING, *December 2nd* 1893—(9:00 o'clock.

Cross-examination:

Q. Where were you the day that Charles Hermes was killed?

A. I was in Okmulgee.

Q. What relation is Thomas Thompson to you?

A. First cousin.

Q. How long has he been living at your house?

A. I guess about 8 months.

Q. What has he been doing there?

A. Just went around the house, works around there.

Q. Where were you when you first heard of this killing?

A. I was just going out of town.

Q. Who with?

A. Baxter and Greggory.

Q. They were your renters, were they not?

A. Baxter was.

Q. Baxter was living with him?

A. Yes, sir.

Q. Is Baxter renting from you now?

A. Yes, sir.

Q. How far does he live from your house?

A. Over fourteen miles; he lives about 15 miles from town.

Q. What time was it when you got home that evening?
A. I guess it was between 3 and 4 o'clock.
Q. Did they stay at your house that night?
A. No, sir; they went on home.
Q. What time did they leave there?
A. I don't recollect now.
Q. Did they drive down to old man Hermes's place?
A. No, sir; rode down.
Q. Horseback?
A. Yes, sir.
148 Q. Whose horse did they ride?
A. Ride one of his own and one of mine.
Q. They unhitched his horses, did they?
A. Yes, sir.
Q. What was it the old man said to you when he first met you?
A. The old man said "One of your boys killed my boy behind the plow out there."
Q. He was riding a horse without any saddle, wasn't he, or did he have saddle on his horse?
A. I don't recollect how it was.
Q. He had the harness on his horse, did he?
A. I don't believe there was.
Q. Do you know whether he had the harness on or not?
A. No, sir; I don't believe he did.
Q. Did he have a Winchester with him?
A. Yes, sir.
Q. How does Hermes spell his name?
A. Well, I don't know; we call him "Hermit" out there.
Q. I will ask you to look at this paper I now hand you and see if that is your handwriting?
A. No, sir; it is not.
Q. Do you know whose it is?
A. No, sir.
Q. What became of Thomas Thompson after this killing?
A. He wasn't there when I got home.
Mr. MELLETTE (of counsel for defendant). I would like to see that letter he has asked the witness about.
The COURT. He has not asked him anything about it.
The DISTRICT ATTORNEY. How long was the defendant gone before he came back?
A. He never came back at all until Sunday, and the marshal brought him then. I sent for a marshal the next day to arrest him.
149 Q. Do you know of his making his escape from the marshal?
A. I heard of it.
Q. How long was he gone, then?
A. I don't know exactly, but I went off to the court and staid about three weeks, and when I got back Perryman, the marshal, wrote over there to me, and I found the letter at the Okmulgee post-office for me, and I wrote to Perryman to come to town, and when he come I sent him down there again and he arrested the boy.

Q. The defendant made his escape from the marshal and was arrested again?

A. Yes, sir.

Q. Where was he arrested the last time?

A. At his mother's house.

Q. How far is that from where you live?

A. About 25 miles.

Q. You were not present at the killing yourself?

A. No, sir.

Q. Who employed the attorneys for the defendant in this case?

A. His father asked me to do it, and I wrote to them.

Q. Didn't you come down and see about it yourself?

A. Yes, sir; his father asked me to do so, and I did.

Q. Haven't you had some trouble with old man Hermes since he has been down here?

A. No, sir; I never did.

Q. Wasn't you up to his room at the hotel?

A. I don't know where his room is.

Q. What hotel do you board at?

A. At the corner house, they call it. He eats there; I don't know whether he stays there or not.

Q. Don't you know he was there at the same time you was?

A. He eats there.

150 Q. Wasn't you looking over the register one night for his room, and the proprietor asked you what you were doing, and you told him you were looking for old man Hermes's room?

A. No, sir.

Q. Didn't you have some conversation about the old man coming there the day before and registering?

A. I and the old man came on the same train, and when he registered was on the 21st, and mine was on the 20th, and I looked at that, and I told him it was a day behind and mine a day ahead.

Q. You did look at it?

A. Yes, sir; at the date, but not the number of the room, though.

Q. Wasn't you up there at old man Hermes's room in company with Morgan and young Haynes, your son?

A. No, sir; I have no son.

Q. Or cousin, rather, and knock at the old man Hermes's door and try to get in, since he has been down here?

A. No, sir.

Q. Haven't you been after him, and don't you know Morgan has, too?

A. No, sir; I don't know where the old man Hermes's room is.

Q. What floor of the building do you sleep on?

A. On the second floor.

Q. Did you hear of anyone being there at the old man's door?

A. No, sir.

Q. Don't you know you were up on the third floor one night when some other parties were at the old man's room?

A. No, sir.

Q. Don't you know that he left that hotel down there on account of the way you all had treated him?

A. No, sir.

Q. Don't you know that he made a complaint to the proprietor about it?

A. I don't know anything about that.

151 Redirect examination by Mr. MELLETTE:

Q. He made some complaint when you were down here in October, did he not, that you were trying to kill him or following him around town, did he not?

A. I heard that he complained all the time.

Q. You heard of this same thing he has been talking about the other day, didn't you?

A. Yes, sir.

Q. You have had a letter presented to you. Do you know anything about any letters they claim to have of yours?

A. I have heard of it. That they took a letter to a certain person and asked him if it was my writing, and he said no; of course, it was a man that knew my writing.

Q. Who was the letter taken to?

A. Dr. Bell.

Q. He is a Government witness?

A. Yes, sir; and he told me about it being showed him.

Q. You assisted the marshal in capturing his boy, didn't you?

A. Yes, sir; I sent about 40 miles after a marshal.

Witness excused.

152 SAM CHECOTAH, having been duly sworn upon behalf of the defendant, was examined by Mr. Thomas H. Barnes, and testified as follows, to wit:

Question. What is your name?

Answer. Sam Checotah.

Q. Do you know this boy, Thomas Thompson?

A. Yes, sir.

Q. Do you know old man Hermes?

A. Yes, sir.

Q. Is he a prosecuting witness here?

A. Yes, sir.

Q. I will ask you if you were in company with Mr. Haynes at any time prior and shortly before this killing, when he had any talk to him about this boy; and if so, tell what he said; if you had any talk in the nature of a threat, tell what it was.

A. He said he didn't want Thomas to come around his place where he was. He said he was acting the monkey on the gate and climbing on posts, and he told Sam to turn him off—to drive him away from his place. He said if he did come around the place any more he would chop his head off.

Q. Did you say anything to the defendant about it?

A. Yes, sir; we told him as soon as we got home.

Cross-examination by the DISTRICT ATTORNEY:

Q. What relation are you to the defendant?

A. None.

Q. What relation are you to Sam Haynes?

A. None at all.
Q. What were you doing there?
A. Just visiting around.
Q. How long were you visiting there?
A. Just two or three hours.
Q. You just happened to be there that day?
A. Yes, sir.
153 Q. What do you do up there?
A. I have been an officer, riding all the time.
Q. What kind of an officer?
A. Sheriff.
Q. He said he would chop his head open?
A. Yes, sir.
Q. And you told the defendant?
A. Yes, sir.
Witness excused.

154 THOMAS THOMPSON, having been sworn in his own behalf, was examined by his attorney, Mr. Thomas H. Barnes, through Interpreter Perryman, and testified as follows, to wit:

Question. Ask him his name.
Answer. Thomas Thompson.
Q. Ask him if he knows what his age is?
A. He says he thinks he is 16 years old.
Q. He knows that he is charged with the killing of Charles Hermes, does he?
A. Yes, sir.
Q. Does he know what his age was at that time?
A. No, sir.
Q. Ask him what time of day it was on the day of this killing, if he knows what time of day it was, that he left home to go down to Miss Checotah's?
A. He says he does not know exactly, but it was after noon; he had his dinner, and then they sent him down there.
Q. Who sent him?
A. Mrs. Haynes.
Q. What did she send him for? What was his business?
A. Sent him to go down there to get a little dress and bonnet made.
Q. How did he carry it?
A. It was wrapped up in a handkerchief.
Q. Did he have anything else with him except that bundle when he went down there?
A. He said he didn't have anything only that bundle, and he had it tied to the horne of his saddle.
Q. What sort of a horse did he ride?
A. A roan pony.
Q. Tell him it is claimed before he got down to the field gate he was off that pony there somewhere near the road; ask him if that is
155 right, and to state if he was off the pony, and, if so, why he got off the pony and what he was doing?

A. He said that the pony he was riding seemed to be a little lame, was limping, and he got down, thought maybe he had a snag on his foot, or something, and he got down to get a little stick and probed it, and he could not find anything, and he got on him and went on.

Q. That is why he was off the pony examining his foot, to see if he was lame or not?

A. Yes, sir.

Q. Ask him if after he got on the pony he started on there he saw the old man Hermes and his two boys, and, if so, where did he see them?

A. He said when he was down off his horse probing his horse's foot, the old man Hermes and his two boys were up there at the gate; they had their horses, and were looking at him, and when he got on his horse and started on they went inside of the gate, and he rode on up.

Q. Ask him if anything occurred, any difficulty between them, or anything of that sort, if anything was said after he rode up there?

A. He says that that young man, the deceased, called to him, and told him to go on——

Q. Tell him to tell what was said and done. Tell him to tell what the parties did, and where they went, and everything that was said before he went on.

A. He says that the young man called to him, and he spoke, and he said the old man Hermes came up to the fence and commenced to abuse him; he went along the side of the fence, and he thought probably that the old man would get over the fence and would probably hurt him, and he rode off in a hurry.

Q. Does he know what became of the two boys?

A. They were standing right there.

156 Q. Did they all go down in the field, or did either of them come back towards him, or does he know about that?

A. He says that they had not hitched up their teams, and when he went to go off he looked back, and he seen them were hitching onto their plows, and had started to plow, and he went on.

Q. Had all three of them hitched onto their plows?

A. Yes, sir; all three of them.

Q. Did he yell after he started on there, or hollo in any way?

A. No, sir; he says he never yelled or holloed.

Q. Ask him if he knows whether at that time now, *now*, or when they were talking to him at the gate, whether they had any guns at that time, or whether he noticed any?

A. No, sir; he never noticed any gun.

Q. Did either of those parties, after he saw them there, go back to the house, or did they all go down at once—down in the field?

A. No; they all went down in the field.

Q. He speaks of two of them abusing him; did this one that was shot, Charley, did he abuse him any about the gate?

A. Yes, sir; it was the older boy, Charley, and the old man, was the ones that abused him. The young one never said anything.

Q. I don't know whether he could understand the language, or whether from the language and actions he inferred it or not—just find out how that is.

The COURT. Better ask him what they did.

Mr. BARNES (of counsel for defendant). Ask him if he knows what they said.

A. He says when this Charley first spoke to him, and com-
157 menced speaking to him, and said something about the hogs, and then the old man took it up, and there was lots said, but he didn't know near all what.

Q. He knew the word "hogs"?

A. Yes, sir; he knew what "hogs" was.

Q. After he rode on and left there, whose house did he go to first?

A. He went to Martin Checotah's.

Q. Is that where Lizzie Checotah's lives, his wife?

A. Yes, sir.

Q. To the house of this woman, Lizzie Checotah, that was in here yesterday?

A. Yes, sir.

Q. What did he do there?

A. He said he told her they had sent him with some sewing, and he told her about it, and left the sewing.

Q. Then where did he go?

A. He came on back.

Q. In coming back did he go to anybody's house, or did he get a gun? And, if so, tell us all about it.

A. He said he came on back, and he got to studying over it and he had been told they talked about killing him before, and he said he went over there to Amos Gray's house, and Amos wasn't at home, and he went in the house and looked up over the door, and there was a gun and he taken it down.

Q. What kind of a gun was it?

A. It was a long, squarrel-barr'led Winchester.

Q. Did it have any cartridges in it, in the chamber or in the magazine?

A. Yes, sir; it was loaded.

Q. Does he know how many cartridges were in the gun?

A. He says he thinks there were four.

158 Q. Did he go then from there back to this place where the shooting occurred?

A. He said yes; that was the main rode over there, and he come right on and struck the fence, and came on up the fence.

Q. Tell him to tell us after he struck the road there, he came on up the fence, and tell all that he did, and all that the other parties did?

A. He said when he got up opposite of where they were plowing, they were just going to the fence, all three of them. He says that he got up opposite of them, and they commenced on to him again, and they said something about a gun, and one of them started towards the fence, and he looked and he seen the gun standing in the corner of the fence, and then he said that he knew they intended to kill him, and he just threw up his gun and fired and shot this Charley.

Q. Then what did he do after that?

A. He run then; and then the old man jumped on the horse and ran after him.

Q. Ask him if he knows how far Charley was from the corner of the fence where the gun was when he shot?

A. He says it is about as far as that gentleman with a paper in his hands over there [indicating about 30 or 40 feet].

Q. What was Charley doing when he shot?

A. He said he was going to where the gun was, to the fence, and he thought if he got to where the gun was he would shoot him.

Q. How does he mean going; had he left his plow, or how was his plow and his horses?

A. He come away from the plow.

Q. Moved over towards the plow?

A. Yes, sir.

Q. He had moved away from his plow and had started towards him, had he?

A. Yes, sir.

159 Q. Did he try to shoot the old man?

A. No, sir.

Q. Was he on or off his horse when he fired the shot?

A. He was on his horse; he hadn't got off.

Q. Did he do anything except fire the one shot? Did he try to shoot any more, or try to hurt any one else?

A. After he shot that one shot then he just turned his gun down and run, he said.

Q. Does he know whether anybody pursued him at that time or soon after?

A. He said when he run, that the old man Hermes pursued after him for quite a distance and stopped, and he went on then to the house, and there was a couple of horses there in the yard, and just as soon as he got to the house he shoved the Winchester into the buggy that was sitting there, and caught one of these other horses and saddled it up, and went into the house. He had a pair of boots in there, and he went in the house and got them and his hat, and when he came out this old man Hermes had turned back; he wasn't going back in the field, but was going towards where there was some little brush sheds, and he got on this other horse and run over there towards where Sam Checotah lived—I made a mistake there—Martin Checotah is the one.

Q. What direction from Sam Haynes's was he going? Which way did he start from Sam Haynes'?

A. He went south, he says.

Q. When did he next see the old man; and, if he saw him again, what occurred?

A. As he went on from the place—and there is a place out there in the prairie where there is three trees in the brush—and he saw old man Hermes and his horse, and he was going right in that direction, and then when he saw that he turned and old man Hermes shot at him.

160 Q. Was the old man off his horse when he shot at him?

A. Yes, sir; off his horse. The horse was under a tree.

Q. How far was the old man from the tree?

A. He was as far from the tree as that gentleman there [indicating about 25 feet].

Q. Ask him if that is about 8 or 10 steps, if he knows?

A. He says he thinks it is about 10 steps; he says the man was off his horse that far and was coming towards him.

Q. He turned and went away, and the gun shot at him by the old man after he turned. Did he have any arms at that time?

A. No, sir; he never had any arms.

Q. Where did he go from there?

A. He said that he went on, and as he was getting pretty near into the timber he looked back and saw old man Hermes coming on towards town.

Q. Where did the defendant go that night?

A. He went to his sister's.

Q. Did he go to his uncle's?

A. He went to his sister's first, and then went from there on over to his uncle's.

Q. How long did he stay at his uncle's?

A. He said after he got to his uncle's he taken the saddle off his horse and staid there awhile, and then he took a notion he would go where his mother lived, and he started and got off quite a ways, and then he just got down and slept there that night.

Q. That was the first night after the killing?

A. Yes, sir.

Q. Does he know how far his sister lives from Sam Haynes's?

A. He says he don't know exactly, but he says Sam Haynes is not very far from town, and his sister's was right there at town.

161 Q. What town does he mean, Okmulgee?

A. Yes, sir.

Q. How far does his uncle live from Okmulgee?

A. He says it may be two miles; he says he don't know how far a mile is, but it may be two miles, or not so far.

Q. What time of day was it when he got to his uncle's?

A. It was dark when he got to his uncle's.

Q. When did he get to his mother's?

A. He went on, and the next morning he got to his mother's—nearly noon.

Q. He speaks of going to the house of Sam Haynes's and saddling another horse and getting his hat and boots. Was he bareheaded when this shooting occurred, or did he have some other hat on?

A. He said he had a hat on, but it was an old hat, and he just went and changed it.

Q. At the time of this shooting, as he rode up there, ask him which one spoke first, he or Charles Hermes, or did he speak at all?

A. He said it was the deceased spoke to him first.

Q. Did he say anything to the deceased?

A. No; he never said anything, because he did not know what he was saying, and he did not know ho' to talk to him.

Q. Could he tell anything that the decaased said as he started from the plow towards him or before that?

A. He said he don't know anything that he said, except something about a gun.

Q. Did he call the deceased a son of a bitch before he shot?

A. He says he never said anything of that kind; he don't know what the meaning of son of a bitch is; he does not know how to use it.

Q. Ask him who first arrested him in this case?

A. A deputy marshal by the name of Cornelious Perryman.

162 Q. Creek Indians?

A. Yes, sir.

Q. Did he leave him after he arrested him, and, if so, where did he go to?

A. He said that he run off from him, but it wasn't his intention; there was another man put him up to run.

Q. Who was that?

A. He says he didn't know their names, but there was two young fellows there at the place where he was taken to that night, and one of them put him up to run off.

Q. Where was he taken to that night?

A. To Jesse Pigeons'.

Q. Is that near Wagoner, or where?

A. Not very far from Okmulgee.

Q. Were they Indian fellows?

A. Yes, sir; both Indians.

Q. Ask him where he was first arrested?

A. He said that he had been staying at his mother's all the time, and he went over to his uncle's, and he came back there that night, and they told him there was a marshal there, and they wanted him to give up and come in.

Q. Did he give up to him?

A. Yes, sir; he said he and his mother came over to the house where the marshal was, and he surrendered to him and came on.

Q. Was that the first time or the last time that he was arrested?

A. The first time.

Q. The first time he had been over to his uncle's, and he heard the marshal had been to his mother's for him, wanted him to give up?

A. His mother told him as he came home.

Q. And then him and his mother went to where the marshal was and he gave up to him?

A. Yes, sir.

Q. Ask him, after he left the marshal, as he said he did, if he went back to his mother's, or where he went to?

163 A. He went back to his mother's.

Q. Was he arrested there the second time, or was he arrested, or did he give up then or not?

A. He said he had been out hunting, and had just come back, and he was sitting out on the porch, when the marshals come there at his mother's.

Q. The second time that he was arrested?

A. Yes, sir.

Q. Did he give up to them, or did he run from them, or what did he do?

A. He said he never run; they came right up on the porch; he knew they were after him, and he never ran; he just surrendered to them.

Q. What marshal was that; the same one that arrested him before, or some other marshal?

A. It was the same marshal that arrested him before, Cornelius Perryman, and there was another white man with him.

Cross-examination by the DISTRICT ATTORNEY:

Q. How old does he say he is?

A. 17.

Q. How long had he known Charles Hermes?

A. He says he does not know just, but then they were under the same employment.

Q. He had seen them around, had he not?

A. Yes, sir; he seen them nearly everyday, because they were right close there where they were working.

Q. Ask him if he had ever been hunting and fishing with them?

A. No; he never had.

Q. Ask him if he had ever had any previous difficulty with them?

A. He said they had never had any difficulty between themselves; he had never said anything to them, but they had been threatening him, threatening to kill him.

164 Q. Ask him who told him they had been threatening to kill him?

A. Sam. Haynes and Sam. Checotah.

Q. When had they told him that?

A. He says he do not know just what month it was, or what time it was, but then it was in the spring sometime, because him and Willie Haynes were building a fence; setting post at the time that Sam. Haynes and Sam. Checotah told him this.

Q. What did they tell him?

A. He says that Mr. Haynes and Mr. Checotah told him that they had told him that he had been making fun of them, and going on, acting the fool, and said if he did not quit it they would chop his head open with an axe.

Q. Ask him if he had made fun at them?

A. He said he had laughed at the old man one time. He was fighting one of his horses, but then he didn't mean any harm of it; he just simply laughed at him fighting the horse.

Q. Ask him if he made fun at him after that?

A. No; he never had after they told him about what the old man had said, and he never made any more fun at him.

Q. Ask him if he was making fun at him the day that he shot that boy?

A. No, sir.

Q. Ask him where he first saw the old man Hermes and his boys that day that the killing was done?

A. He seen them at the gate; they were going into the field to work.

Q. Ask him how close he was to them?

A. He says he wasn't very far, but he don't know just exactly how far.

Q. Ask him if he rode up to where they were?

A. They had got inside of the field, and he rode up on the out-
165 side, and they were going down in the field, and this young man halted him.

Q. What did the young man say to him?

A. He says that he halted him and was talking, and all he knew was the expression about a hog.

Q. He could not understand anything else they said, could he?

A. No; he didn't know any other words; they said lots of things, but he didn't know anything but hogs.

Q. Ask him if what they said to him made him mad?

A. Yes, sir; it made him mad, because he said he had never done them anything; never said anything, and then the threats they had made, and talking as they did, it made him mad.

Q. He was mad then when he left them, was he?

A. He was mad when he left them, but he did not think he would do anything, because he had heard that the United States law was pretty hard, and he did not want to get into any trouble.

Q. That is when he left them he didn't think he would get into any trouble?

A. Yes, sir.

Q. How long was it after he left them until he came back?

A. He said it was a good while; he didn't know just how long. Mrs. Checotah lived a good ways from there, and it was after noon when he was at the field, and he said it was rather late in the evening when he came back.

Q. Ask him where he went after he left?

A. Lizzie Checotah's.

Q. When he left Lizzie Checotah's, where did he go?

A. He came on to Amos Gray's house, and went in and got the gun.

Q. What direction is Amos Gray's from this field?

A. He says the field is this way and the house that way; that would be nearly southwest, I guess.

166 Q. Ask him if could not understand anything they said to him except about hogs, what was it made him mad.

A. He said he just took it for granted that they were saying he would steal their hogs, or something of the kind.

Q. He took it for granted?

A. Yes, sir.

Q. Ask him how long he staid mad.

A. He says that he got mad at this, and got to studying over it, and then that the United States law was pretty hard, and he wouldn't make any attempt himself, but then they had been talking of killing him and he thought it would be best to arm himself, and he went and got the gun.

Q. What was he thinking about doing when he thought about the United States laws?

A. He said he wasn't thinking about doing anything, only if they attempted to shoot or do anything to him that he would defend himself.

Q. They didn't have any gun when they were talking to him there the first time, did they?

A. No; they didn't have any gun, or he never had any gun.

Q. What made him go and get a gun if he knew they didn't have any at that time?

A. He said that he knew that the house wasn't so far and he thought probably they would go and get a gun, and he thought it would be best to arm himself, but he thought if they didn't say any more to him he would go right on; wouldn't let them see his gun any more, and he kept it down so they wouldn't see it.

Q. He had hid his gun when he rode up there, did he?

A. Yes, sir; he concealed the gun so they could not see it, and thought if they didn't say anything to him he would go right on.

167 Q. Ask him if he told them the first time they talked to him that he was coming back that way.

A. No, sir; he never told them anything at all.

Q. Ask him how he knew they expected him to come back that way, or what made him think they expected him to come back that way.

A. He said there wasn't but the one road to go that way, and he knew that they knew that was the way he was going to come back.

Q. Ask him if they knew where he was going.

A. He don't know whether they knew or not.

Q. Ask him if that is not a prairie country out there.

A. Yes, sir.

Q. Ask him if he could not have gone from Amos Gray's to Haynes' house without going by the field.

A. No, sir.

Q. Ask him what was to prevent him riding around right through the prairie.

A. He said that he could have went around the prairie there if he wanted to, but it was so boggy that it was an advantage for him to keep the road.

Q. He wasn't afraid of these people then, was he?

A. He said he didn't hardly expect them to say anything, and for that reason he went by.

Q. If he did not expect them to say anything, what did he go and get a gun for?

A. He said he thought probably that they might, he didn't know; and he thought it would be best for him to arm himself, so if they did anything he could protect himself.

Q. But he said a minute ago that he didn't hardly expect them to say anything to him.

A. He says that he had an idea that probably they wouldn't say

168 anything to him, but then he didn't know, as they first threatened to kill him, and he thought it was best for him to protect himself if there was any such as that occurred.

Q. They had not attempted to kill him when they first saw him that day, had they?

A. He says he don't know that they had made any attempt, but then they had made their threats, and he could see by the old man's countenance that he was very mad.

Q. They hadn't attempted to hurt him at that time, had they?

A. He said he didn't know what they intended to do, but it looks like as though he would hurt him, when he was going along the side of the fence by him, and he run from him.

Q. How long did he ride along by the fence by him?

A. He says about as far as yonder [indicating about 40 feet].

Q. Ask him where he first saw them when he rode up this last time; where were they?

A. They were just about out to the end.

Q. How far was he from them at that time?

A. He wasn't quite as far as the corner of the room [indicating].

Q. Ask him if he did not see them before he got up to the fence somewhat.

A. Yes, sir; he seen them going towards the fence plowing.

Q. How far was he off at that time?

A. About as far as the yard fence around the court-house here.

Q. Ask him when he saw them coming towards him why he didn't stop.

A. He said he thought that he would pass before they got out to the end, but then his pony was a little lame, and they got out to the end before he passed.

Q. Ask him if the old man and his boy were plowing abreast,
169 if they were along together, or whether one was behind the other.

A. He says the two boys were abreast and the old man was rather behind.

Q. How far behind was he?

A. Just about as far as this gentleman there [indicating a distance of 10 or 15 feet].

Q. Ask him who spoke to him first when he rode up there.

A. He said the deceased spoke to him first. He had just plowed out to the end, and the old man hadn't got quite out.

Q. What did he do when the deceased spoke to him?

A. He stopped, and he saw the deceased go for the gun, he saw the gun, and he saw him go for the gun, and then he stopped.

Q. Ask him how many words the deceased spoke to him before he stopped.

A. It wasn't very many words.

Q. Before the defendant stopped?

A. Yes, sir; before he stopped.

Q. What time was it the deceased started to his gun?

A. Just as soon as he stopped the deceased started towards the gun.

Q. Where did he have his gun at that time?

A. He had it on his side this way, and held the bridle reins in this hand.

Q. How close was he to the fence at that time?

A. Just as nigh as the table there [indicating about 6 feet].

Q. How far was the deceased from the fence?

A. About as far as that gentleman over there [indicating about 30 feet].

Q. How far did the deceased get away from his plow before he shot him?

A. About as far as that gentleman there [indicating about 15 feet].

170 Q. He got as far from the plow as from where he is sitting to Mr. Barnes there?

A. Yes, sir.

Q. Ask him which way the deceased's horse was standing when he left him?

A. The horse was looking towards him, or standing with their heads towards him. As he stopped he just walked around the plow and started towards him.

Q. Ask him if the deceased had plowed out to the end of the row before he stopped?

A. He says he don't think he was out to the end.

Q. Ask him if he had not began to turn his horse?

A. No, he says he hadn't turned yet. He plowed out there and stopped, and the conversation started in among the three about a gun, and this young fellow left his plow and started towards him, and he seen the gun, and he knew if he got to where the gun was he would shoot him, and he shot quick.

Q. Ask him what they said about a gun?

A. He says he don't know what they were saying about a gun.

Q. Ask him if he knew they were talking about the gun he had or the one setting up in the fence?

A. He says they were thinking about the gun at the fence because they could not have seen his gun the way he held it.

Q. Who spoke of the gun?

A. The deceased.

Q. Where was the gun sitting?

A. By a post, by the fence.

Q. Ask him if when the deceased started he started towards him, the defendant?

A. He walked towards the gun.

Q. Ask him which way he was with reference to the gun, what direction he was from the gun?

A. He was right opposite the gun. The gun was just a little in front of him, the defendant.

171 Q. How close was he to the gun?

A. He was about as far as from where he is sitting to that gentleman by the spittoon [indicating about 15 steps].

Q. How far was the deceased from the gun when he started to it?

A. He says that the gun was a little closer to him than it was to the deceased.

Q. How much closer?

A. He guesses that he was nigher to the gun the distance between him and Mr. Barnes, further than the distance between the deceased and the gun was.

Q. Then him and the deceased were nearly as far apart as he is from the west end of this room when he started towards him, were they?

A. He don't think it was that far.

Q. How far were they apart?

A. He says he don't know exactly.

Q. Tell him to say about how far they were. Ask him how far he was from the man he killed when the man was at the plow, and started towards him?

A. About the distance from him to that window with the blind down [indicating about 50 or 60 feet]. He thinks it was that far; he does not know exactly.

Q. Ask him if he was in the road?

A. Yes, sir.

Q. How close did he say he was to the fence?

A. About as far as this gentleman here [referring to one of the jurors, about 15 feet distant].

Q. Ask him if he was going towards the gun when he shot?

A. He shot before he stopped.

Q. Ask him if the deceased was in the turn row when he shot him?

A. He says he don't know exactly whether he was in a turn row
172 or not, because the corn was rather low, and he could not state whether he was in the turn row or not.

Q. Ask him when he shot if the deceased had gotten ahead of his plow; if the plow was behind the deceased when he shot?

A. Yes, sir; he had got passed his plow and passed his horses.

Q. How did the deceased fall then when he fell?

A. He said he never noticed how he fell. He just threw his gun down and shot, and then he run. He says, "I never noticed how he fell."

Q. Ask him if he took aim at him?

A. He says he don't know whether he taken any aim or not. He just threw down and shot him and run.

Q. Ask him, if he didn't know he hit him, what he run for?

A. He said he thought if he hadn't shot him, and they got to the gun, they would shoot him, was the reason why he ran.

Q. Ask him why he didn't wait to see whether he hit him or not before he ran?

A. He said the reason was because if he didn't shoot him, and he got to his gun, they would shoot him.

Q. Ask him why didn't he start to run when the deceased started towards his gun?

A. He says if he hadn't shot and ran he would have been in more danger, and they would have shot him.

Q. He shot first and then run, did he, and he didn't know whether he had hit anybody or not? Ask him if he did not aim his gun at old man Hermes then?

A. No; he never aimed at the old man Hermes. As soon as he made this shot he drew down his gun and run.

Q. He shot to hit this man, did he not?

A. He said he didn't have any idea of whether he had hit him or not, but he just shot and run.

Q. Ask him where he went when he left there?

173 A. He went to Sam Haynes's house.

Q. What did he do when he got to Sam Haynes's house?

A. He said as soon as he got to Sam Haynes's he jumped down off his horse and caught another horse, and there was a saddle in the yard there and he threw that on him, and then went in the house and got a pair of boots he had there and a new hat, and got on the horse and went off.

Q. Ask him how long he had had those boots and the hat?

A. He says he don't know just exactly how many days he had them. He thinks he had bought them on the Saturday before.

Q. Where did he buy them?

A. At Okmulgee.

Q. Had he bought them himself?

A. Yes, sir.

Q. Ask him where he went that night?

A. He went to his sister's.
Q. Ask him if he knows Lizzie Thompson?
A. No, sir; he don't know her.
Q. Ask him if this lady who is here sick at the hotel is not a cousin of his?
A. Yes, sir.
Q. Ask him what her name is?
A. Louanna.
Q. Ask him if he didn't see her there that night?
A. He says he saw her, but he never spoke to her.
Q. Ask him if he didn't talk to her and tell her that he had killed Hermes.
A. No, sir.
Q. Ask him if he ever told her that?
A. No, sir; he never did.
Q. He never did talk with her about it?
A. No, sir.
Witness excused.

174 Mr. MELLETTE (of counsel for defendant). Outside of the agreement we want to make on proof of plea of former jeopardy, we have no other testimony.

The COURT. I do not know that it is really necessary to offer any proof on that.

The DISTRICT ATTORNEY. I rather think that would be the rule, but I told the gentlemen I thought we could agree on that.

The COURT. The court is bound to take notice of what transpires in the same trial. There is no doubt of that.

The DISTRICT ATTORNEY. The court could just state to the jury simply what occurred on the former trial.

The COURT. Yes, sir; what is what the court will do.

Mr. MELLETTE (of counsel for defendant). Do you agree to the facts of the former trial?

The DISTRICT ATTORNEY. I make no question about that at all.

The COURT. The court is certainly bound to take notice of what occurs in the former trial, of the records, of the facts, and of the things that are of evidence that took place. The court will just tell the jury what occurred, and upon that basis the charge will be put.

Mr. MELLETTE (of counsel for defendant). That is all we want.

Defense rests.

175 Whereupon the Government produced and examined the following witnesses in rebuttal: Dr. Geo. W. Bell, Jacob Hermes, who testified as follows, to wit:

176 *Testimony introduced by the Government in rebuttal.*

Dr. GEO. W. BELL, upon being called back by the Government in rebuttal, was examined by Hon. Jas. F. Read, the district attorney, and testified as follows, to wit:

Question. Did you probe the wound of Charles Hermes?
Answer. No, sir.

Mr. MELLETTE (of counsel for defense). We object to that, because it is not in rebuttal.

The DISTRICT ATTORNEY. On which side of the median line did that ball strike?

A. It was about an inch off the median line at the juncture of the fourth and fifth ribs with the sternum.

Mr. MELLETTE (of counsel for defense). We object to any further examination.

The DISTRICT ATTORNEY. The witness probably stated this before, but I ask him again just to refresh my memory.

Mr. MELLETTE (of counsel for defense). Let it go.

The DISTRICT ATTORNEY. How was the bleeding from that wound?

A. It was very slight.

Q. Was the hemorrhage external or internal?

A. Internal.

Q. Were there any indications there that that body had been moved from where it fell?

A. No, sir; I didn't see any at all.

Q. If the body had been moved would that have produced external bleeding?

A. Very probably it would.

Mr. BARNES (of counsel for defense). We object to the manner in which the question is put. It was altogether owing to how the man was handled.

177 Q. Were you down there when Gregory and Baxter come down there?

A. Yes, sir; I was there when they came up.

Q. Where was the old man Hermes at that time?

A. As well as I can remember, they both came up about the same time—that is, he and the other parties came up about the same time.

Q. Did you hear the conversation that took place between them and the old man?

A. Well, there was a conversation there, but it was while I was examining the body, and they were off a little ways behind me.

Q. How far from you?

A. As well as I remember, they were between me and the fence, and propably 10 or 12 feet away.

Q. How long did that conversation last?

A. I don't know, but probably they were talking there five minutes.

Q. Could you hear their conversation?

A. I heard a part of the conversation, but I paid no attention to what was being said, because I was busy with the body.

Q. Did you hear what old man Hermes said to them?

A. No, sir; I don't know that I heard him say anything directly to them.

Q. Who was he talking to and how was he talking?

A. Some one made the remark that they had ought to go up and arrest Sam Haynes and all of them, and at that Mr. Hermes began to cry and take on.

Q. Did you hear the old man detail to these men how the killing occurred, or what his boy was doing at the time?

A. No, sir.

Q. Did he have any such conversation as that there?

A. He might have had, but if he did I did not notice it.

178 Q. You heard nothing of that kind?

A. No, sir; probably the question was asked how it occurred, and he said it was nothing except they had a racket a few days before, something about some hogs. I remember that much.

Q. Did you hear him state anything about his boy starting towards defendant, or starting towards his gun, or anything of that kind?

A. No, sir.

Q. Did he undertake to tell in the presence of Greogory and Baxter how this killing came up?

A. I don't remember whether it was while they were there or not.

Q. Did they leave before you did?

A. No, sir; we left at the same time.

Q. You came there a little before they did, did you?

A. Yes, sir; I was the first there.

Q. Did the old man tell you how the killing came up?

A. Yes, sir; but I don't know whether he told me there or before I left town.

Q. When this man came down there did he make any statement to these two how the killing occurred?

A. I don't remember.

Q. Did you hear statement that he made to them about how the difficulty occurred?

A. Only that he had been told that this would be done.

Mr. MELLETTE (of counsel for defense). We object to that.

The COURT. If this is a part of the same conversation that these two have detailed, the Government is entitled to all that conversation.

179 Mr. BARNES (of counsel for defense). The court did not permit us to go into the whole matter yesterday evening.

The DISTRICT ATTORNEY. I offered to prove yesterday that Sam Haynes instructed them to do so and so when they went down there, and that is what the court ruled out.

Mr. MELLETTE (of counsel for defense). We object to this witnesses' testimony, because it is not in rebuttal.

The COURT. It is clearly in rebuttal.

Mr. MELLETTE (of counsel for defense). We except to the ruling of the court.

The DISTRICT ATTORNEY. Now, just state all that you heard old man Hermes say in the presence of Baxter and Greogory as to the killing of his son by the defendant, that is, as to how he killed him, what his son was doing at the time or immediately before the killing.

A. He said they were going to work and the defendant passed along about the time they came to the gate. They went down inside the fence, and the defendant on the outside. Whether there was anything said or not I don't remember, but after the boy got off some distance he whooped and passed on. When he came back Charlie Hermes had just plowed out to the end and he was behind and the defendant rode from the west, and the old man said the first he noticed he heard some one speak, and that he could not understand what Charlie said or what the defendant said, for the defendant was talking Creek, but just about that time a gun fired, and that is just about all I heard him say.

Cross-examination by Mr. THOS. H. BARNES:

Q. I believe you stated awhile ago that you were examining
180 the body and you could not remember distinctly what was said and you paid no attention as to what was being said there?

A. Yes, sir.

Q. Do you remember whether the talk you heard was made to Baxter and Greogory or not?

A. Yes, sir; he made that statement to the crowd there.

Q. You don't know whether that conversation was addressed to Mr. Baxter or Mr. Greogory or not?

A. No, sir; I don't know whether he addressed any conversation to them or not.

Mr. MELLETTE (of counsel for defense). We move to exclude the testimony of this witness in rebuttal, because the Government has not identified the conversation about which he has testified as being the same one that Baxter testified to.

The COURT. I think it would be competent anyhow. You undertook to contradict Hermes by Baxter. Here is a statement made in the hearing and presence of Baxter and at the same time.

Mr. MELLETTE (of counsel for defense). We save an exception.

The DISTRICT ATTORNEY. That conversation was had when Baxter and Greogory were in the crowd?

A. Yes, sir.

The COURT. How far did you say the body was from the plow handle?

A. Right by the plow handle.

The COURT. Right where a man would stand if he was hold of the handle?

Mr. MELLETTE (of counsel for defense). That is objected to because it is leading.

The COURT. The court has a right to put leading questions to call out the truth.

181 Mr. BARNES (of counsel for defense). We save an exception.

The DISTRICT ATTORNEY. In the position a man would be in if he was holding to the handles, or about that position?

A. Yes, sir.

Mr. MELLETTE (of counsel for defense). We object to the questions and answer, and save our exception.

The COURT. Yes, sir.

Mr. MELLETTE (of counsel for defense). Did you say in your examination in chief, "I paid no attention to what was being said. He said that they had a racket a few days before about some hogs, but whether there was anything else said I don't remember?"

A. I believe I said something like that.

The DISTRICT ATTORNEY. What conversation did you have reference to at that time?

A. The conversation that Mr. Hermes was making. He was just talking, but he wasn't talking directly to anyone.

Q. This other statement you heard him make was at the same time?

A. Yes, sir.

Witness excused.

182 JACOB HERMES, upon being recalled in rebuttal by the Government, was examine' by the district attorney and testified as follows, to wit:

Question. Do you know Sam Haynes?

Answer. Yes, sir.

Q. Have you had any trouble with him since you have been down here? Has he been about you any, I mean?

A. I didn't have any with Sam Haynes, but here the other night——

Mr. MELLETTE (of counsel for defense). We object to that.

The DISTRICT ATTORNEY. Did Mr. Haynes have anything to do with you here?

A. No, sir; not as I know of.

Q. I misunderstood you then. You know Baxter and Greogory?

A. Yes, sir.

Q. Did they come down there the day you were there?

COUNSEL FOR DEFENSE. We object to that, because he has been asked about it before.

The DISTRICT ATTORNEY. If he has been aske' about it, it is all right. He may stand aside.

Witness excused.

Testimony closed.

183 The defendant excepting at the time to the following questions, answers, and declarations of the court and district attorney in examining witness Dr. G. W. Bell in rebuttal.

COURT. How far did you say the body was from the plow?

Answer. Right by the plow handles.

COURT. Right where a man would stand if he was hold of the plow handles?

DIST. ATT'Y (to witness). In the position a man would be in if he was holding the handles or about that position?

Answer. Yes, sir.

This was all the testimony produced in the case, and then the counsel for the United States and the counsel for the defendant proceeded to argue to the jury the cause on their respective sides.

And after argument the court upon its own motion delivered orally to the jury the following charge, which was taken by the court stenographer:

184 In the circuit court of the United States, within and for the western district of Arkansas. November term, A. D. 1893.

UNITED STATES
vs. } Murder.
THOMAS THOMPSON.

Charge of the court.

Delivered December 4th, 1893—8:40 o'clock a. m.

PARKER, J. (orally):

Gentlemen, the defendant in this case stands before you charged with the crime of murder, because on the 8th day of June, A. D. 1893, in the

Creek Nation, Indian country, he wilfully and with malice aforethought took the life of Charles Hermes, a white man, and not an Indian, by shooting him with a gun. That, in short, is the charge against him. On account of the condition in this case there is a double issue here; rather there are two issues. One arises on the merits of the case, and one arises upon the facts and under the law as to whether or not the court can proceed with a trial in this case upon the merits. Both of these issues have been submitted to you, and the court will proceed, first, to give you the law on the first issue presented. One of the defenses in this case is a special one, arising from the special plea of the defendant, pleading former jeopardy. Jeopardy as used here means that in the law the defendant has been once so far put on his trial as that there was danger to his life, arising from conviction of the crime of murder, and that the
185 trial had progressed so far as that jeopardy by the rules of the law had attached, and that he can not again be tried for the same crime. This claim of former jeopardy is based on the fact that on the 23rd of November, A. D. 1893, a jury had been once empanelled in this case and sworn in the case to try it according to the law and evidence; that the counsel on each side had made a statement of the case to the jury, and one of the witnesses had commenced to give evidence, when one of the jurors, James Johnson, made known to the court that he was on the grand jury which found the indictment charging the defendant with the murder for which he was then on trial; that he, the said James Johnson, had heard the evidence presented to the grand jury when the defendant was indicted; that he had not discovered the fact that he was on such grand jury until he heard a part of the evidence of Mr. Hermes, and by that means he was enabled to identify the case.

The court desires to say in this connection, in justification of Mr. Johnson, the juror mentioned, that there was no corrupt purpose on his part—none in the world. It was simply an honest mistake and it was entirely right and proper and his duty to make the fact known as he did make it known, and there should be no reflection on him as a man, citizen, or juror. I say this in justice to him, not that it affects the merits of this case one way or another.

The court was of the opinion that the said James Johnson was incompetent as a juror; that a trial of the case with Mr. Johnson on the jury might be largely to the prejudice of the defendant, he having heard the evidence and having passed on the question of indicting or not
186 indicting; that he was so much incompetent that if the jury with him on it were to render a verdict of guilty that the court would, in the discharge of its duty, be compelled to set the same aside, because the said James Johnson was an incompetent juror, having once heard the evidence and formed an opinion as to the guilt of the defendant. I do not know whether Mr. Johnson stated exactly whether he had formed an opinion or not, but, of course, that would be the reasonable conclusion, he being a competent juror to sit as a grand juror, and having heard the evidence and acted in the discharge of his duties he must have done so presumably upon the evidence before him at that time.

The defendant, by his counsel, refused to consent to proceeding further with the trial of the case with the juror James Johnson on the panel, and

refused to consent to the discharge of the jury, and requested that the said jury render a verdict without proceeding any further in the trial of the case.

These are facts of which the court takes judicial notice, the proceedings having occurred in the presence of the court, and they stand before you the same as though they were proven by evidence. That is one method of presenting evidence to a jury. There are certain things of which the court can take notice and tell the jury what they are.

The court charges you that, under the law, the state of case it has named is not such an one as gives the defendant the right to claim that he has been in such jeopardy formerly as to prevent you from passing upon the merits of this case and determining his guilt or innocence from the law and the evidence in this case.

187 Mr. Story, in his work on the Constitution, in discussing this question, vol. 2, sec. 1787, says:

"Another clause declares that no person shall be subject 'for the same offence to be twice put in jeopardy of life and limb.' This, again, is another great privilege secured by the common law. The meaning of it is that a party shall not be tried a second time for the same offence after he has been once convicted or acquitted of the offence charged by the verdict of a jury, and judgment has passed thereon for or against him. But it does not mean that he shall not be tried for the offence a second time if the jury have been discharged without giving any verdict; or if, having given a verdict, judgment has been arrested upon it, or a new trial has been granted in his favor; for in such a case his life or limb can not judicially be said to have been put in jeopardy."

Mr. Bishop, in his New Criminal Law, section 1039, says:

"Juror disqualified: If, after the trial has commenced, a juror is discovered to have been insufficiently sworn, or to be insane, or not of the panel, or from any other cause incompetent, he may be discharged, or the error corrected otherwise without entitling the prisoner to go free. Some state the rule to be that anything discovered in a juror showing him not to be a proper one to sit in the case will work this result. But the better form of the doctrine is that the matter must be such as the defendant can make ground for a new trial if the verdict is against him."

Hardly any court would permit a verdict to stand after a trial if it discovered that a gentleman who was on the grand jury who sat in judgment on the case as such was a petit juror, and it would necessarily have to set the verdict aside.

188 In the case of State v. Allen, reported in 46 Conn., 561, the principle is declared that—

"In the course of a trial for murder, and after witnesses had been examined on the part of the State, the prisoner's counsel stated to the court that they had been informed and believed that one of the jurors was disqualified by having before the trial expressed an opinion that the prisoner was guilty, and asked the court to suspend the trial and hear evidence upon that point. The court heard the evidence, and upon it the prisoner's counsel claimed that the disqualification of the juror had been proved, and asked the court to so find. The court so found. They then offered to waive the disqualification and proceed with the trial with the

juror in question on the panel, or to go on with eleven jurors. The court refused to do either and discharged the jury. Held, that these facts did not operate as a bar to the further prosecution of the prisoner."

The same doctrine is declared in the case of the Commonwealth v. McCormick, 130 Mass., 61; 39 American Rep., 423, and in a note to the same case of a recent English case—the case of Reg. v. Bently, 39 Am. Rep., 423—Mr. Justice Wolf discharged the jury pending the trial because one of the jurors arose in the box before the conclusion of the evidence for the prosecution and said they didn't wish to hear any more of the case; that they had already decided upon their verdict. Another said they didn't believe a word the prosecuting witness had said, and had made up their minds not to convict. They were discharged and the party tried with another jury.

189 Other authorities might be produced on the question, but as far as this court is concerned it has been conclusively settled in a way that is binding upon it by the Supreme Court of the United States, not only in a case decided many years ago, but in a very recent decision by that court, the case of U. S. v. Perez, 9th Wheaton, 599. In speaking of this question of former jeopardy the court in that case said:

"We are of the opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere."

In the very recent case of Simmons v. United States, 142 U. S., 148, the Supreme Court of the United States settled this doctrine, and I read from that case:

"This was an indictment on section 5209 of the Revised Statutes for aiding and abetting one Classen in embezzeling and misapplying the funds of a certain national bank in the city of New York. The defendant pleaded not guilty.

"On January 26th, 1891, the case came on for trial upon the issue thus joined. A jury was empanelled and sworn. Goodnow, one of the jurors, stated on his voir dire that he had no acquaintance with the
190 defendant and had never seen him to his knowledge. The case was opened to the jury; and on that and following days witnesses were examined on behalf of the United States.

"Before the coming in of the court on Friday, February 6, the district attorney received, and exhibited to the defendant's counsel and to the judge, an affidavit of one Ward to the effect that during four months in 1884 the juror Goodnow and the defendant occupied adjoining rooms in a building in the city of New York, and were often seen conversing together in the halls of that building. The court thereupon adjourned the trial until Monday, February 9.

"In the afternoon of February 6 the district attorney received from the defendant's counsel a letter commenting upon the statements in Ward's affidavit and denying their truth, asserting that Ward had had a quarrel

of long standing with the defendant, and stating that he had sent a copy of the letter to the daily papers; and the substance of this letter was published in the morning papers of February 7.

"On the coming in of the court on February 9 the district attorney read affidavits to the foregoing facts, together with Ward's affidavit, the letter of the defendant's counsel, and the publication in the newspapers, and thereupon moved the court 'to withdraw a juror, for the reason that, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.'

"In opposing this motion the defendant's counsel admitted the making of Ward's affidavit, its communication to the counsel on both sides and to the court, and the writing and publication of the letter, but sub-
191 mitted an affidavit of the defendant denying that he had ever known Goodnow or had ever to his knowledge seen him before the trial, as well as an affidavit of counsel explaining his action, and stating that he wrote and published his letter because he had been informed that the reasons for the adjournment of the court had been made public by the district attorney.

"The judge gave his decision upon the motion as follows: 'I am of the opinion that the facts presented make it necessary to discharge the present jury from further consideration of this case, in order to prevent the defeat of the ends of justice and to preserve the rights of the people, and also to preserve the rights of the accused to be tried by a jury every member of which can render a verdict free from constraint. It is manifest that the knowledge respecting the statement made by Ward, conveyed to the jury by the publication of the letter of the defendant's counsel, makes it impossible that in the future consideration of this case by the jury there can be that true independence and freedom of action on the part of each juror which is necessary to a fair trial of the accused.'"

That is read for the purpose of showing the nature of the case.

"Mr. Justice Gray, after stating the case as above, delivered the opinion of the court:

"The general rule of law upon the power of the court to discharge the jury in a criminal case before verdict was laid down by this court more than sixty years ago, in a case presenting the question whether a man charged with a capital crime was entitled to be discharged because the the jury, being unable to agree, had been discharged, without his
192 consent, from giving any verdict upon the indictment. The court, speaking by Mr. Justice Story, said: 'We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner.

But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests, in this and in other cases, upon the responsibility of the judges, under their oaths of office.' United States v. Perez, 9 Wheat., 579.

"A recent decision of the court of Queen's Bench, made upon a full review of the English authorities, and affirmed in the exchequer chamber, is to the same effect. (Winsor v. Queen, L. R., 1 Queen B., 289, 390; S. C., 6 B. & S., 143, and 7 B. & S., 490.)

"There can be no condition of things in which the necessity for
193 the exercise of this power is more manifest, in order to prevent the defeat of the ends of public justice, than when it is made to appear to the court that, either by reason of facts existing when the jurors were sworn, but not then disclosed or known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the Government and the accused."

In this case a man who was on the grand jury which found the indictment against the defendant could scarcely stand impartial, and it would certainly be to the detriment and injury of the prisoner if any court should hold that a trial could be proceeded with under such circumstances.

"As was well said by Mr. Justice Curtis in a case very like that now before us, 'It is an entire mistake to confound this discretionary authority of the court, to protect one part of the tribunal from corruption or prejudice, with the right of challenge allowed to a party. And it is, at least, equally a mistake to suppose that in a court of justice either party can have a vested right to a corrupt or prejudiced juror who is not fit to sit in judgment in the case.' (United States v. Morris, 1 Curtis, C. C., 23, 37.)

"Pending the first trial of the present case, there was brought to the notice of the counsel on both sides, and of the court, evidence on oath tending to show that one of the jurors had sworn falsely on his voir dire that he had no acquaintance with the defendant, and it was undisputed that a letter since written and published in the newspapers by the defend-
194 ant's counsel, commenting upon that evidence, had been read by that juror and by others of the jury. It needs no argument to prove that the judge, upon receiving such information, was fully justified in concluding that such a publication, under the peculiar circumstances attending it, made it impossible for that jury, in considering the case, to act with the independence and freedom on the part of each juror requisite to a fair trial on the issue between the parties. The judge having come to that conclusion, it was clearly within his authority to order the jury to be discharged, and to put the defendant on trial by another jury; and the defendant was not thereby twice put in jeopardy, within the meaning of the fifth amendment to the Constitution of the United States.

"The only other exception argued is to the statement made by the judge to the second jury, in denying their request to be discharged without having agreed upon a verdict, that he regarded the testimony as convincing. But at the outset of his charge he had told them, in so many words, that the facts were to be decided by the jury, and not by the court. And it is so well settled, by a long series of decisions of this court, that the judge presiding at the trial, civil or criminal, in any court of the

United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination, that it is only necessary to refer to two or three recent cases in which the judge's opinion on matters of fact was quite plainly and strongly expressed to the jury as in the case at bar."

But that last paragraph, however, does not touch on this ques-
195 tion under consideration now.

Now, I do not think it is necessary to take up your time in reading any other authorities upon the subject of former jeopardy. The court, of course, is bound by these adjudications of the law in regard to the question as adjudicated by the highest tribunal in the nation. We are all bound by them. Whatever it says we must submit to, and it is unnecessary in this case to detain you by referring to other authorities. Then, I can state to you, that upon the facts as I have enumerated them, your duty will be to find the issue raised by the special plea of former jeopardy for the Government in this case, and when you have made your finding upon that you will then proceed to consider the charge of murder upon the merits of the case as they have been presented to you by this case; and upon this question of former jeopardy the form of your verdict will be:

"We, the jury, on the issue raised by the special plea of former jeopardy, upon the facts presented to us as evidence, find the defendant has not, by the trial in this case having been heretofore commenced, been put in jeopardy, and we find the issue raised in this case, on the special plea of former jeopardy, for the United States."

That form of verdict will be given to you when you retire, and is to be signed by one of your number chosen as foreman.

We now go to the merits of this case. I have already stated to you the nature of this charge by reading, in substance, the indictment. It becomes necessary to ascertain what we must find in order to establish this charge. You are required to find, first, that Charles Hermes is
196 dead. You are required to find also that he was a white man, which is a jurisdictional fact, necessary to give you a right to hear and determine the case upon its merits. It has been shown that he was a citizen of the United States, or a white person, and that would give you the right to hear and determine the case; in other words, the court has jurisdiction.

Then, as I have said, you must find that Charles Hermes is dead; and, secondly, that he died by violence of the kind named in the indictment—that is to say, that he died because he received a gunshot wound; that that caused his death. Now, of course, you bring to bear upon that proposition your observations in life, and the fact that he was apparently in good health, and the fact of the reception of the wound, where it was received in his body, and as reasonable men you pass upon that question to ascertain whether these facts are sufficient to satisfy you of the fact that that killed him. You can only get at it by inference in any case. I say you must be satisfied the death was caused by a gunshot wound. There is no controversy in this case over the character of the weapon used, so, therefore, it is hardly necessary for me to tell you that a pistol-shot wound would be responsive to that allegation. There is no question, however, about the character of weapon used as shown by this proof. The third

proposition required to be established, and you will bear in mind that all of these propositions are to be established beyond a reasonable doubt; that is to say, that you as reasonable men are satisfied of them. As I was about to remark, the third proposition is that this violence was inflicted by the defendant, Thomas Thompson. Now, you go to the evidence upon that as you pass along. I am taking this charge apart and giving
197 you the elements that enter into it. As we pass along from one element to the other, let your minds revert to the testimony to see whether or not these propositions are proven as you go along. The fourth proposition is that this violence was inflicted in such a way as to make murder. That is the first proposition we have before us for consideration.

It is necessary that we should stop at this point to inquire what it takes in the law to make murder—what murder is under the law; what elements enter into that act which produces death was to authorize us under the law to characterise that act as an act of murder. First, the law says, it must be done, as a matter of course, unlawfully—against the law. It must be an act not authorized to be done by the law; secondly, it must be done wilfully, and, thirdly, under the law of the United States, it must be done with malice aforethought. Now, whenever you are able, by the evidence, and when you have the law defining these elements which characterise the act of killing so that you can say beyond a reasonable doubt that it was done willfully, and done with malice aforethought, there can be no other crime connected with that act of killing but murder, because that is what it takes to make the crime of murder; and we have no right to dally with the law; we have no right to compromise it away; we have no right to enter into an understanding, that although a crime is justly and properly characterised as a crime of a certain character that we will find it something else. That is just as much a false verdict as it would be to ignore the facts and set them all aside, pay no attention to them, and come to a conclusion unauthorized by either the evidence or the law, because
198 the first duty is to find whether a crime has been committed, and the second duty is to correctly characterise or name that crime, and one duty is equally as solemn as the other. Now, we can not know what is meant by a killing being done willfully and with malice aforethought until we go to the law, because the law defines these expressions—it defines the word willfully and it defines this phrase malice aforethough, and of course we are to discharge our duties in accordance with the law, as a verdict must be found by the law and by the evidence, and we must go to the law to find out how it defines these characteristics of the crime. We will proceed to read from another charge giving a definition of the word "willful:"

"The word 'willful' as used in this connection means intentional. If a man does an intentional act which produces death, he does a willful act which produces death, because one is synonomous with the other; and if he does an act which is intentional or willful which produces death, with a gun or a pistol, or any other weapon with which life can be easily and readily taken, because of the known and usual connection between the act done and the deadly result, the law holds that the result is willful or intentional when the act is done. In a case where a man presents a gun at another and fires it at him, you can have no trouble in coming to the conclusion as to whether the act was willfully done or not, because you

have a state of case which enables you from the manner of the party's doing the act to determine that there was an action of the will which prompted the doing of the act—that it was an act that could not occur of itself. For example, a gun can not be presented by itself; it can not
199 pull its own trigger; it can not send the hot, hissing missi*al* into the vitals of the party shot at and killed, the ball that takes his life. There is some intelligent agency that does that. To get at the fact as to whether there is that intelligent agency you take the act done, the manner in which it was done, the character of the weapon used, and from these fa*ts* we draw precisely the same conclusion that you would draw as reasonable men upon the observance of a fact of that character in the every day affairs of life.

Then, I ask you the question, if you would see A shoot at B, what conclusion would you come to as to whether A was doing that act intentionally or not, from the fact of his shooting? You look at his position; you look at the position of the weapon; you look at the evidence of the character of the weapon used, and the manner of its use, and you would necessarily, naturally, and reasonably conclude that he was doing that act of shooting intentionally, and you would also conclude, because you recognize the known connection between that act and the result, that the result was intentional. And I say to you, that under the law, by the rules of the law, when you have a set of facts of that kind, as reasonable men you are authorized to come to the conclusion that A did the shooting in that way; that he wilfully did it, and that he consequently willfully produced death. That is the way you can get at it. It is the only way you can get at it, because, as has been said by counsel, and by the court, hundreds and perhaps thousands of times in this court, there is one element of all these crimes—in fact, there are two elements in this case that can only be proven by circumstances, by the things surrounding the transaction, by the way the party does the act, by the character of the
200 weapon he uses, and the manner in which he uses it. Now, let us see for a moment if this position is a correct one. Chief Justice Shaw, of Massachusetts, in trying a case of murder, and charging the jury in the case of Commonwealth v. Yach, said:

"A same man, a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his acts. If, therefor, one voluntarily or wilfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life."

In the language of one of the present justices of the Supreme Court of the United States, while sitting on the bench in California, in the case of State v. Strowbridge, said:

"When you have a state of case showing that one man shoots a gun or pistol at another, within a few feet of him, or within shooting distance of him, that the conclusion necessarily, naturally, and reasonably arising from that is that he intentionally shot; and not only that, but that he intentionally killed, because the law says when an act of that kind, as well as all other acts, is wilfully or intentionally done, the party is held to have intended the necessary, natural, and probable consequences of the act done by him." If, therefore, one voluntarily or wilfully does an act

which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of the wilful act is to do another some bodily harm, and death in fact follows as a natural and probable consequence of the act, it is presumed that he intended such con-
201 sequence, and he must stand legally responsible for it. So, where a dangerous and deadly weapon is used with violence on the person of another, as this has a direct tendency to destroy life, or to do some great bodily harm to the person assailed, the intention to take life or to do him some great bodily harm is a necessary conclusion from the act."

That is, it is a conclusion that reasonable men usually or generally come to. They arrive at that conclusion when they see a condition of that kind, and there is nothing more strikingly illustrative of that than when a man is himself confronted with a condition of that kind. If he see a man who has presented a gun or pistol at him, and he is able to discern by the attendant circumstances that the man then and there is using it as men use it when they kill, he comes to the conclusion very readily that his life is in danger; that his life is in jeopardy; that he is in danger of bodily harm, and he comes to that conclusion as a rational man, as a reasonable man, by the light of the facts and circumstances surrounding him, and you are authorized to act here just the same way, to draw the same conclusion when such a state of case is presented before you.

Then you go to the evidence in this case to ascertain whether or not this defendant, Thomas Thompson, presented the gun at the man who is alleged to have been killed, the boy, Charles Hermes, and when so presented that he fired it, and that as a consequence Charles Hermes was struck with the shot, and by reason thereof he died. If you have that state of case before you, you have a state of case which usually or generally would satisfy reasonable men that the act done by the defendant was
202 intentionally done, and consequently willfully done, and that the death produced by him was willful.

The next element of this crime necessary to be established is that the act was done with malice aforethought. We first find what is meant by that, then we find how under the rules of the law directing us, directing our method of coming to conclusions, we may come to the conclusion that the killing had malice aforethought in it or not. This condition is something which originates from the mind of the party doing the act. We must find some way or another of getting at the condition of the mind that is doing that act. If we can not fathom it, if we can not penetrate its innermost recesses to see what is going on there, we must adopt some other means that are reasonable, some other process that is rational, to get at the mental condition of the party, because both of these characteristics of murder spring from the condition of the mind of the party. The law says we may do it by circumstances; we may do it by reason of the character of the act done, the manner in which it was done, and we may solve the condition of the mind by the light of facts and circumstances that surround the act, going to characterise it, to show what manner of act it is, bringing to bear upon the condition of things of that kind the observations of men of mature judgment, of men of intelligence, of men who, because of the information they possess, are to the greatest extent qualified to discharge the great and responsible duties devolving upon them as jurors. As I have

remarked to you before, when malice aforethought exists, murder exists.

203 If the proof in this case shows that the taking of the life of Charles Hermes was under such circumstances as to show the existence of this element, then the crime is murder, and nothing else. Now, the law expresses the meaning of this phrase in several ways. It says, by one definition, that it is the doing of a wrongful act without just cause, in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give a right to the party to defend against it, or that it was done in the absence of mitigating circumstances. In this case, if you find that the shooting was done wilfully, and if, under the law I will give you, there was nothing to justify that act of shooting, or nothing to mitigate it, from the condition of facts which show that the killing was willfully done, and the condition of facts that eliminates from the case the condition where the party would have a right to do it, or could ask for mitigation of the act done, you have a condition that has in it malice aforethought, because you have the doing of a wrongful act that results in death without just cause or excuse, or in the absence of mitigating facts. Again, the law gives another definition. It says: It is the doing of a wrongful act without just cause or excuse and in the absence of mitigating facts, and when it is done in that way it shows that he who did it had a heart void of social duty and a mind fatally bent on mischief.

You will bear in mind that while we are living in a state of society we have certain great duties resting upon us, and the highest one is to protect innocent human life. If we so far forget that duty as to destroy innocent human life in such a way and under such circumstances as that we can not ask for a mitigation of the act done—if we take human

204 life because of special spite or grud'e or ill will, or because of general malevilence, or because of general reckles'ness, or because of a disregard of the rights to live that may be possessed by another, or because of moral turpitude, and in the absence of legal provocation or of mitigating facts, we then willfully destroy such life, and when we do it under either one of these circumstances or conditions we find that it has the characteristic that under the laws of the United States is attached to an act of killing to enable us to see what the character of that act is, known as malice aforethought; and it says we have a heart void of social duty, and we have a mind fatally bent upon mischief, because the doing of an act in that way shows we have forgotten our duty to our fellow-man, and the doing of that act in a reckless, wanton, and wicked way shows we have a heart void of social duty and a mind fatally bent on mischief.

Again, the law defines this characteristic of the crime of murder, and it tells us how to find it when it says "it can only be found by circumstances, because malice aforethought, like willfully, is something which exists in the mind that is necessary to be found to make up this element of the case, and as you can not get into the mind to know what is going on there, and as you could not tell what was transpiring there if you could get into it, you must learn it in some other way, and there must be some rational way by which you must learn it, some way which rational men would adopt, because we are not authorized to adopt any other method than that which is reasonable in arriving at conclusions; and there is a reasonable way by which men may arrive at conclusions. It is from the

nature of the transaction, the nature of what takes place, the
205 character of the thing done, and all the surrounding facts and circumstances that you are authorized to take into consideration to see what was the nature of the thing done, whether it was an innocent act or criminal act, and, if a criminal act, what was the nature of that criminal act.

The law again says, that "malice aforethought is the grand criterion which distinguishes murder from other homicide; and it is not so, properly speaking, spite or malevolence to the deceased in particular, as any evil design in general. We do not have to have special hatred against the party we kill to make it malice aforethought. If we have that hatred, if we have a case of previous threats made by the party killed, or somebody connected with him, and we seek vengeance because of these threats, then we have a condition which evidences a condition of special spite or grudge or ill will, and consequently a condition which shows deliberation, shows premeditation, which shows thought of beforehand, and whenever that condition exists, whenever the purpose to kill because of special spite or grudge or ill will exists, and previous preparation to do an act of killing—if, for example, he deliberat'ly selected or prepared a deadly weapon that he might use it under such circumstances, in consequence of the existence of that condition we have a state of case which would evidence special spite or grudge or ill will as the motive which prompts the party to take life. Not, as I will tell you presently, that we are always to find in the man's mind who kills an adequate motive. The only thing that is regarded in the eye of the law as an adequate motive is a state of case where a man can justly and properly slay, where the law gives him the
right to slay—when the motive, legally speaking, is regarded as
206 adequate. "If we do the killing in a reckless, wanton, and wicked way, the law says it evidences the existence of an evil design in general—a wicked heart, the absence of moral perception, and a total disregard of moral duty—a total absence of that which causes us to recognize the rights of other people, and when such a condition exists it is murder just as well as when this condition of mind grows out of special spite or hatred or animosity or ill will. You take the case of a person killing another who he never saw before and never heard of before. How could he have special spite or grudge or ill will? That condition arises out of a certain relation between the parties, and the relation must be founded on acquaintance. There must be some feeling between them, some misunderstanding. The party must be laboring under some real or imaginary wrong to create that condition, and that can not be when a party kills another who is a stranger; yet it would be horrid to ask law-abiding men to say that because a stranger was killed there was no murder in it, if he was killed unlawfully, without just cause or excuse, or in the absence of legal provocation, because in such a case it is murder just as much as though the killing was because of special spite or grudge or ill wil', because it is a manifestation of an evil design in general that may be so exerted against mankind as to destroy them, take away their lives, the same as a purpose that is based upon special spite, grudge, or ill will.

Again, the law says that "malice is evidenced by the existenc' of a wicked, depraved, and malignant heart, a purpose to do a willful act. It may be either expressed or implied in the law. Express malice is where

one with a sedate, deliberate mind and formed design doth kill
207 another, which formed design is evidenced by external circumstances, discovering that inward intention, as lying in wait, antecedant menaces, former grudges, concerted schemes to do another some bodily harm. So, in many cases, where no malice is expressed the law will imply it, as when a man willfully poisons another, in such a deliberate act the law will presumt malice; and if a man kills another suddenly without any or without considerable provocation, the law implies malice, for no person except of abandoned heart would be guilty of such an act upon a slight or upon no apparent cause."

Again, the law says that "malice is an intention to do bodily harm. If a man by his acts, such as shooting at another, manifests an intention to do bodily harm, and that intention as manifested takes away the life of another, if there is nothing in that case which gives him the right to do that bodily harm under the law, or no condition surrounds him that mitigates that crime by the rules of the law, the very intention that surrounds him makes malice aforethought—that is, in the absence of these other two conditions. "It means a formed design to do mischief. It has also been defined as a deliberate intent to kill. It does not necessarily import any especial malevolence towards the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty and a mind fatally bent on mischief. It imports premeditation." Let us see what is meant by that. You will naturally ask, how long does a man have to think about doing an act which results in death before he does it, in order to show premeditation? Suppose that an innocent citizen
is killed without just cause or legal provocation. What difference
208 does it make to him how long the man has thought about it? What difference does it make to the community? The law says that premeditation may be a condition of the mind that springs into existence cotemperaneous with the doing of the act, because if a man draws a deadly weapon and presents it at another, or even he is drawing it in a violent way, the other need not stand still until he is shot down. And why? Because the other sees from the doing of the act, the drawing of the deadly weapon, an act of violence being executed, and he sees in that way a deadly purpose, and he can then and there act even to the extent of taking life of that other, if necessary, to save his own life.

Why does he have that right? Because the other evidences premeditation by the drawing of the deadly weapon, even before he presents it. He has no purpose to kill before that. He does not know that the man has ever thought of a design to kill him, but he sees it spring into existence then and there, and from that fact he has evidence of a formed design to take his life, and he may take the life of such an aggressor if he can not avoid the danger in any other way. Then, premeditation does not require that a man should think of a purpose to kill for a year, or a month, or a day, or even an hour. It may be the conception of a party instantaneously; it may spring into existence and may be cotemporaneous with the execution of it, and yet it is premeditation. "There must logically be a period of prior consideration. The time will vary as do the temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Man have sometimes

seen the events of a lifetime pass in a few minutes before
209 their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act, and if the intent to do mischief as thus formed is a deliberate intent, though after no matter how short a period of reflection, it none the less is malice. Malice is an intent of the mind and heart; the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act, or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, or in the absence of mitigating circumstances, which produces death, it is murder, whether it grows out of a condition of special spite, or animosity, or special design to take life, or the purpose to do some other act of a wicked, malignant, or criminal nature, which, because of its nature and the way it is done, a human life is taken, malice aforethought exists, because that is the doing of a wrongful act without just cause which results in murder, which evinces a formed design to do such mischief as may deprive a fellow-being of life.

"Malace is an inte t of the mind and heart. There is never presented to the jury direct evidence of what was the intent of the man's heart at the time. You can not tell the condition of the mind by direct proof, bearing in mind the distinction between these two kinds of evidence, positive or direct proof and circumstantial evidence. Positive or direct proof is the proof which shows the existence of the very thing itself that you are hunting for."

How, then, are you to discover it? How can you find the existence
210 of mental condition by proof, by evidence? You can not prove it, as I have told you, by positive evidence. The only way you can prove it is by circumstantial testimony. That is the only way you can get at it, by the doing of an act, and by the manner in which it was done.

Now, we do not do anything in this world that does not leave evidence of the purpose for which it was done, and, if the circumstances surrounding it are brought to light before a jury that they may look at them, they are enabled to characterise the act and enabled to name it correctly if they do their duty. There is no question about it. It is so ordained that a man's conduct may be properly designated. It is so arranged that circumstances attending the doing of an act may be taken hold of, investigated, compared, and analysed by intelligent men and intelligent agencies, and from these circumstances alone we are enabled to ascertain what purpose the party had in view when he did the act. If he had a purpose to do an act that was malevolent, that was wicked, an act without just cause or excuse, or in the absence of legal provocation, or in the absence of that which justifies or mitigates—if an act was done which grew out of general malevolence, general reckles'ness of human life, and that act was of a character that destroyed human life, you may take that act to enable you to characterise the condition of the mind of the party at the time he did the act, and you are not required to find the condition of mind that would evidence any other existence of malice aforethought. You are not required to find that he had special spite or grudge or ill*ie*ll against the party he may have slain, because if he slew from recklessness of life, from reckless-

ness and malevolenc' of purpose, from that sort of feeling and that sort of mental condition, you have a condition that has malice aforethought in it.

211 The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart and the processes of the mind are to us, or to any one outside of the individual, exhibited by the acts which the individual performs; and you are entitled to infer what his intent was—what are the processes of his mind and the feelings of his heart—by a careful study of the acts which he performs and all the other external indications of which he may have given of what his state of mind and heart was, bearing in mind that under the law he is held responsible for any act or any consequence that may naturally or reasonably or probably spring from an act wilfully done by him; and if he does an act which is willful, and there results a deadly consequence from that act, that consequence is denominated by the law a willful consequence; and if the conditions are absent which give a party the right to do the act, give him the right to exercise the right of self-defense, or that he has a right to ask for a mitigation of the crime, you have the willful doing of an act in such a way as that it is done with malice aforethought, and it is consequently murder when the result of that act is death. As an eminent text writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances, no case in which it is demonstrated as express. The best we can do is to infer more or less satisfactory a man's intent from his acts. As I have already told you, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particula' result is, from our common experience, presumed to have anticipated that
212 result, and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons, indicating design, then it is not necessary to prove that such design existed for any definite period before the fatal blow. From the very fact of a blow being struck, we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant.

We frequently find the statement laid down in reported cases and by text writers that malice is to be inferred by the use of a deadly weapon. This court always modifies that, and I call your especial attention to the modification. Malice is to be inferred from the use of a deadly weapon, if the evidence shows that the use of it in a deadly way was not authorized by the law of self-defense; or the evidence shows that it was not an act that because of the conduct of the party killed at the time of the killing that was mitigated under the law. If these two conditions are eliminated from the case by the evidence showing the use of the weapon, and the wilful use of the deadly weapon, if these conditions are eliminated it shows the existence of malace aforethought, because there are but three conditions under the law of the United States growing out of the taking of human life; one is a condition that has willfully and malice aforethought in it, the other is a condition that is justifiable, and the other is a state of case where the party under the law can ask that his crime may be mitigated; and if you eliminate from the state of case these two conditions that I have named, and the evidence shows the willful use of a deadly weapon,

it must necessarily show that it was done with malice aforethought, because there is nothing to justify it; there is nothing to mitigate it, and
213 the willful or intentional use of a deadly weapon under such circumstances which produces death shows a heart void of social duty and a mind fatally bent upon mischief.

Again, the law says that malice is to be inferred from the attendant circumstances surrounding the transaction, and the jury have a right, and it is their duty, to look at these attendant circumstances to see what character of act it was, to see what was the condition of the mind of the party or parties who engaged in the act, as being the only way that we can arrive at the conclusion as to whether it was an act accompanied with malice aforethought, or the converse of that, in which there was an absence of the element of the crime of murder. Now, anything that shows deliberation, anything that shows premeditation, a premeditated purpose to do a willful or wicked act that might result in death, is evidence that may be considered by the jury going to show the existence of malice aforethought. For instance, the law lays it down as a principal, as is said by Mr. Greenleaf, that premeditation may be shown by the deliberate selection, preparation, and use of a deadly weapon. A man goes to work and gets a gun and prepares it for deadly action, thus deliberately selects it with the determination to use that weapon under such circumstances and in such a way as that he is not justified in using it. Mr. Greenleaf says that the selection, preparation, and use of a deadly weapon shows a premeditated purpose, shows a design to kill. If the purpose to kill directly existed in the mind of the party who killed, and in consequence of the existence of the purpose previously formed, that may be evidenced, as I have already told you, by the selection and preparation and subsequent use of a deadly agency, if that purpose to kill
214 existed and there is not in the transaction that which gives a party the right to kill, then the only reasonable condition that can follow from the act is that of murder, because this state of case called malice aforethought is one that grows out of previous thought, or premedi'attion, or deliberation to do the act, or a contemplated purpose to kill when there is no right to kill. Whenever there is a purpose thought of beforehand to take life, whenever there is a preparation to accomplish that purpose by the selection and preparation and subsequent use of a deadly weapon, and there is no right under the law to use it, the fact of the selection and preparation of that weapon in that way evidences the fact that the purpose to kill was thought of beforehand, and that it was an unlawful killing, that it was a killing not justified under the law, and there can be no condition resulting from that act but murder.

I have now given you these several definitions of malice aforethought. I have read these different definitions as so many different methods of expressing the same idea, because there are twelve minds here that are called upon to see the exact meaning of this expression, and you may arrive at it by different methods; that is to say, one gentleman on the jury may understand it correctly by one definition, and another man get at it more readily and easily by having it expressed another way, though they all amount to the same thing, and that is why I have taken up your time in repeating the different forms of the definitions of the elements that enter into the crime of murder. I have undertaken to give it to you in

such a way that I presume you fully comprehend what is meant by the characteristic of the crime of murder. You will then ascertain
215 how the killing was produced, the way it transpired, the way it was done; you see what character of weapon was used, you see whether that weapon was prepared beforehand, whether it was deliberately and willfully used at the time, and in a state of case where the evidence shows that the killing was willfully done; as I have told you, if there is an absence from the case of that which shows that the party had a right to so willful'y kill upon the law of self-defense, or that the killing was willful, but that there were mitigating facts attending it, the proof which shows it was willful'y done under such circumstances would necessarily show it was done with malice aforethought. In a case of that kind, the very same degree of proof that shows a willful killing would establish a killing with malice aforethought.

These are the two elements which make up this crime—that the act was done willful'y, and done with malice aforethought. If these elements exist in this case, and go to characterise the act of killing done by the defendant, it is your duty to find the first proposition involved in this charge established, and that there was a crime committed, and that crime was murder.

Now, gentlemen, as I understand the argument here, it is claimed by counsel for the defendant that the defendant had a right to do this act. I have had no intimation from counsel representing the defendant whether they want the court to charge you upon the subject of manslaughter or not. What do you say as to that, gentlemen (addressing counsel for defendant)?

Mr. MELLETTE (of counsel for defendant). If the facts justify it——

Mr. BARNES (of counsel for defendant). I stated in my argu-
216 ment that there were three questions involved, three propositions—murder, manslaughter, and self-defense.

The COURT. I have made up my mind after this that I am not going to charge on the subject of manslaughter unless it is requested, that is, where——

Mr. BARNES (of counsel for defendant). We were going by the custom heretofore of the court.

The COURT. I understand, then, that you request the court to charge manslaughter in the case?

Mr. BARNES (of counsel for defendant). Yes, sir.

The COURT. Gentlemen of the jury, there is another condition, as I have already told you, and that is defined by the law as a state of self-defense, a state of case where a party has a right to take human life. If he has that right he can only get it under the law, because none of us have any rights outside of the law. There is a species of wild criminal justice (and that is the proper designation of it) which abides in the minds of some men who think they can exercise rights aside from the law, but that is a mistake. There are no rights belonging to any citizen outside of the law, I don't care whether that citizen is an Indian, a white man, or who he is. We are all subject to the law of the land, and we all stand upon the same plane before it, and when we ask for rights we must go to the law to get them, and the law defines accurately and concisely the state of case which gives a man the right to slay his fellow, and then be exempt from punishment because of his doing it, and it is by that law that you

and I are governed; we can know no other law; we have no right to know any other law. We must, therefore, go to that law to see whether or not the defendant in this case, under the facts and circumstances,
217 having slain the youth, Charles Hermes, alleged in the indictment to have been killed, had a right to kill him; whether the facts are of a character that gave him the right to take his life. Now, I will not detain you unnecessarily in defining this law of self-defense. The facts and circumstances in this case are fresh in your minds. You have heard the evidence as it came from the witnesses, and you are able, I trust, without making any mistake, to correctly and wholly apply the definition of self-defense to these facts if it is appropriate to them. The law says that under certain circumstances the individual citizen may take life. Now, let us see, first, what condition must exist in order to give him the right to take life.

"A man who in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take away his life, or to do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life, or to prevent the intended harm, such as retreating as far as he can, or disabling his adversary, without killing him, if it be in his power."

That is the first proposition of the law of self-defense. Let us recapitulate it, let us go over it again, to see what it means exactly. "A man who is in the lawful pursuit of his business." He must be doing that which he had a right to do; he must be in the exercise of a right belonging to him. That is the first condition. If he is not surrounded by that condition, if his conduct and his actions indicate that he is not doing that which he has a right to do, you will learn presently that no matter
218 what may be the actions of the adversary, or the party killed, he is deprived of the law of self-defense, because it is not under all circumstances that we can invoke it. We must, in the language of the law, be measurably in the right. I will give you after 'while also the proposition that cuts a man off from this right of self-defense, that deprives him of it.

Now, when he is doing that which he has a right to do, and he is attacked by another, what sort of attack must be made upon him? He must be attacked under such circumstances as to indicate from the character of that attack that the purpose of the party who is executing the attack is to take his life or do him some great bodily harm; and not only that, but that must be a condition against which he must use all other reasonable means before he takes the life of the party so situated. He must use all other reasonable means to protect his life short of taking the life of the man who is executing or seeking then and there to execute the deadly purpose against him. He is required to do that, and this attack must be of a character that, from the way it is made and the character of the weapon the party is using in making it, indicates a purpose to take away his life, or to do him some great bodily harm that may produce death, or that may maim him, or inflict permanent injury upon him, because this is a law of proportion, and a man can not resent an attack that may inflict a slight injury upon him by taking the life of the party executing the attack or making that attack; he can not do that. We are not, in other words, to weigh an act of that kind in the balance against a human life.

It is only one life against another that can be weighed, or a life against an act that may inflict great bodily harm. Under this proposition the youth, Charles Hermes, who was killed, at the time of the killing, to give the defendant the right to invoke this proposition, must have been
219 making some attack upon the defendant with a deadly weapon, or about to do so, and so nearly in the execution of it that the defendant could not avoid it; that that attack was of a deadly character, or of a character to inflict great bodily harm; that he was then and there in the act of executing it, or so near to its execution as that the party could not avoid the deadly result, or the result of great bodily harm; and that it was such conduct upon the part of Hermes that indicated a purpose to take the life of the defendant, or do him some great bodily harm. And when that state of case exists, the defendant, before he can invoke this proposition, must have used all the means in his power otherwise to save his own life before he shot Hermes, such as getting out of the way if he could, such as retreating as far as he can, the law says; such as using violence of a less character than that used, the law says.

Now, take this proposition, to see whether it is applicable to this case; see whether or not from the facts and circumstances Charles Hermes was making an attack at that time; that it was actually being executed by him, or so nearly being executed that the defendant could not avoid it, and that the defendant was doing that which he had a right to do. I will speak to you further upon that proposition as we go along. The second proposition is a state of case where the danger is not actual, where it is not real, but there must be from the actions of the party killed, from the characteristic of what the party killed is doing, that which would satisfy a reasonable man that the attack was real, that it was deadly, or that it was likely to produce great violence, great injury that might result in death or in a maiming. It will not do to say that under this law of apparent danger if a man has a conception of danger that he can act upon it, although it may be a conception of deadly danger, and slay, because the ideas
220 of right are so illy defined in the eyes of some people, and their regard for this sacred thing called human life is so little that a conception of danger in a man of that kind would spring into existence and have an abiding place when there was no proper place for it in the mind of a just man, in the mind of a proper-thinking man. It will not do to say that this state of apparent danger is to be determined by the mind of every man. You are the final arbiters to see whether it exists or not, or whether it had an existence as shown by the testimony, and you are to pass upon the question whether or not there was that in the nature of the acts and conduct of the party killed to indicate that he was then and there making a deadly attack, or the attack implied a condition that might spring up and bring great injury to the party so situated.

Under this proposition, as under the other, the defendant must have been doing what he had a right to do at the time of the killing, and when that was the case, from the nature of the attack or apparent attack in this case of Charles Heremes, there is reasonable ground to believe that there is a design to destroy his life or commit a felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended. You are to find what was the nature of the attack of Charles Hermes at the time he was killed. He must have

been doing at that time that which would satisfy the mind of a reasonable man that he had a deadly purpose, or purpose to do great bodily harm; that he was then and there in the act of executing, or about to execute, and that it was such a purpose not brought into existence by the defendant, but
that it was brought into existence by the conception of a wrongful or
221 wicked purpose upon the part of Heremes. If the theory be true that while at the plow handles, in the act of turning his horses, that he started, according to the statement of the defendant, for the gun—if that is true, you are to look to the question to see whether or not the acts of the defendant in going there armed, and the assertion that a state of animosity existed between these people and himself, that the fact of his going there in that attitude was not a fact that would give Charles Hermes the right to prepare himself to defend himself against an act of violence. Upon that theory I call your attention to a state of case that you may look at and say whether or not there are facts in the case which warrant the presumption. I read this proposition of the law over again: "When, from the nature of the attack"—in this case upon the part of Charles Hermes. If there was no attack made by him, if there was no indication of making any attack, if there was not that in his conduct which indicated a p'rpose of that kind, then this principle of the law does not apply, and neither does the first principle that I have given you. But if the defendant in this case was in the lawful pursuit of his business and was attacked by Hermes in such a way as to indicate a deadly purpose, or a purpose to do him great bodily harm or mischief, then he could stand upon the law of self-defense to the extent of killing, provided he could not protect himself in any other way. But if there is an absence from the case, as established by reliable facts, facts upon which you can depend, the fact that an attack had been made by Hermes, or was about being made, and so near to its execution that the party could not avoid it, then neither proposition applies to the occurrence. "When, from the nature of the attack, there is reasonable ground to
believe that there is a design to destroy his life or commit any felony
223 upon his person, the killing the assailant will be excuseable homicide, although it should afterwards appear that no felony was intended." There must be that in the shape of the actions of Hermes in this case which indicated to the mind of a reasonable man that he was then and there, or about then and there, to execute a deadly design, or a design to do him great bodily injury, and that the party could not avoid it, so near to its execution was it. These acts may turn out to be deceptive, but the conclusion as to whether there was that state of case or not must spring from something actually done by Hermes, because no bare conception in the mind of a man establishes a foundation for a conclusion that he can slay and then claim that there was apparent danger. There is no law of that kind.

Now, again, reading from the case of John Evans v. State, decided in Mississippi in 1870 by an able court, and passed upon by the supreme court of the State, the judge delivering the opinion of the court in that case said:

"To shoot another down on sight, and who, at the time, is making no hostile demonstration dangerous to life and limb, and especially if not prepared and armed so to do, is, in law, murder."

Clearly and correctly expressed is the principle of the law by this eminent jurist. It is murder because the law tolerates no justification, accepts no excuse, for the destruction of human life on the plea of self-defense, except that the death of the adversary was necessary, or apparently so, to save his own life or his person from great bodily injury, and danger of such design being accomplished. The danger to life or of great personal injury must be imminent; it must be present at the time of the killing,
224 really or apparently, and so urgent that there is no reasonable method of escape, except to take the life of the party. When we use the term "apparent," "apparent danger," we mean such overt actual demonstration by conduct and acts of a design to take life or to do some great personal injury as would make the killing apparently necessary to self-preservation.

There is the law, and the whole of the proposition better stated than I can state it, and more accurately defined than I could possibly define it; so clearly expressed that it seems to me that any man can understand it, and not be lead astray as to what is meant by this doctrine of apparent danger giving the right to take life; but if any one should not understand it, let's take the illustration given by this judge: "If A, who had threatened the life of B, presented at him a gun in a shooting posture and within range of B, B might well anticipate the fire; and if he should kill A he would be justified, although it turned out afterwards that the gun was not loaded, and it was only intended to frighten him. Here was an act done which was 'apparently' dangerous to life, in execution of the threat. This serves to illustrate what is meant by 'apparent' danger."

I have now given to you the propositions bearing upon the right of self-defense. It is for you to say whether at the time of the killing of Charles Hermes by this defendant that this defendant was doing that which he had a right to do. If he was not, notwithstanding Charles Hermes might have made a violent demonstration that was then and there imminent, then and there impending, then and there hanging over his head, and that he could not avoid it except by killing him, if his conduct wrongfully, illegally, and improperly brought into existence that condition, then he
225 was not in an attitude where, in the language of the law, he was in the lawful pursuit of his business. Now, that we may make no mistakes, the law tells us what acts upon the part of men deprive them of the law of self-defense, whether it relates to an actual and real state of danger, or danger of great violence to the person, or a state of case where that exists apparently. The law says we may deprive ourselves of that right by our own wrongful conduct, and, that we may make no mistakes, let us go to the law to see under what circumstances a man may deprive himself of the right; and in order that you have an exact illustration, I read to you a short case, that of Vaiden v. Commonwealth (12 Gratt., 717; Horr & Thomp. Cas., Self-defense, 222):

"The deceased and Vaiden were at the latter's house one evening drinking and playing cards together. Some high words passed between them, growing out of the deceased charging Vaiden with cheating. Vaiden's wife told the deceased that he had promised to make no 'fuss,' to which he assented, said good night, and left the house. He did not go away, however, for he was heard in the yard swearing very loudly and apparently much enraged. Hearing him, Vaiden took up his gun and

started for the door, but was induced by his wife not to go out. Guns were evidently used instead of walking-sticks in that neighborhood, for just then deceased called through the window that he wanted his gun, and the weapon was handed to him through the door by Mrs. Vaiden.

"The deceased then walked away, accompanied by two other persons, and by a son of Vaiden's, who went with the party as far as the fence to let them through the draw-bars. As they stood at the fence talking
226 Mr. Vaiden appeared with his gun, seeing which the deceased jumped over the fence, took hold of his gun by the barrel as if to use it as a club, and rushed at Vaiden. The latter called out that if he did not stop he would shoot him. The warning went unheeded, and when the deceased got within a few feet of him Vaiden, falling back a few steps, fired. The deceased then struck Vaiden two blows with the breach of his gun and staggered back mortally wounded, dying a few hours afterwards. Vaiden, indicted for the killing, set up the plea of self-defense. But the court held that he, being responsible for the altercation in following the deceased with his gun after he had departed from the house, could not avail himself of that plea, and he was convicted."

Now, in this connection, we have a maxim of the law which says to us that notwithstanding the deceased at the time of the killing may be doing that which indicates an actual, real, and deadly design, or that he is doing that which indicates apparently a deadly design, if he by his action who seeks to invoke the right of self-defense brought into existence that act upon the part of the deceased at that time by his wrongful act, his wrongful action did it, he is cut off from the law of self-defense, no matter what may have been the conduct of the deceased at that time. What are these propositions? First. "Going to the place where the slain persons is, with a deadly weapon, with the purpose of provoking a difficulty, or with the intention of having an affray." Now, under that proposition, I say, that if it be true that Charles Hermes at the time of the killing was actually and really, or apparently, in the act of executing a deadly design, or so near in the execution of it that the defendant could not avoid it, and that it was brought into existence by his going to that place where
227 Charles Hermes was with the purpose of provoking a difficulty or with the intent of having an affray, he can not invoke the law of self-defense. He can not do that. Secondly. "Using provoking language, or resorting to any other device in order to get another to commence an assault so as to pave a pretext for taking life. Thirdly. "Agreeing with another to fight him with deadly weapons." Now, those propositions state the law of self-defense. You are to look to the evidence to see whether the defendant brought that state of case into existence, to see whether or not in consequence of a conception upon his part, of a state of grudge, or illwill, or any hard feelings that existed between the parties, that he went off and armed himself for the purpose of making an attack upon Hermes, or any of the party whom the Government offered as witnesses, this law of self-defense can not avail him. Of course the law of self-defense gives him the right to arm himself for the purpose of defending himself as long as he is in the right, but if he has a conception that deadly danger may come upon him, but he is away from it so he can avoid it, his duty is to stay away from it and avoid it, because he has no right to go to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty, or with the intent of having an affray.

Now, some discussion has been had in this case with regard to previous threats. Previous threats fill a certain place in every case where they are brought out in the evidence. If, at the time of the killing the party is doing nothing which indicates a deadly design, or a design to do great bodily mischief—if he is doing nothing of this kind, I say, at that
228 time—then previous threats can not be considered by the jury. If they are satisfied from the law and the testimony that the deceased was not doing anything that amounted to a deadly attack, or the'e is no question in their minds as to what the attitude of the deceased was, previous threats can not be considered by them; they can not enter into their consideration of the case by way of justifying any act that resulted in the death of Charles Hermes from the act of the defendant; they can not be considered, I say, because you can not kill a man because of previous threats. You can not weigh in the balance a human life against a threat of violence. There is no right of that kind in the law. Threats are only admitted as illustrative of another condition that exists in the case. If the party at the time of the killing who is killed is doing that which indicates a purpose to do great bodily harm, to kill, or is about to do it, so near doing it, and goes so far that it can be seen from the nature of the act what his purpose is, then for the purpose of enabling you to see more clearly the situation of the parties you can take into consideration threats made by him. But, if there is an absence from the case of that which indicates a deadly design a design to do great bodily harm, really or apparently threats can not be considered in connection with the asserted right of a defendant that he can avail himself of the law of self-defense. You can not do that. But, if threats are made, and there is an absence from the case of the condition that I have given you where you can use them as evidence, you can only use them and consider them for the purpose of showing the existence of special spite or illwill or animosity upon the part of the defendant; and if he killed
229 alone from these threats, because these declarations here made, growing out of a controversy over hogs, the claim that he had injured them, or beaten them, or taken them, threats of that character, if they were made by the old gentleman, Mr. Hermes, or the boys, and that the defendant killed because of these threats, instead of his having a right to have these threats reproduced before you as a justifying cause for the killing they become evidence of malice aforethought as showing special spite, special illwill, as showing that the killing was done because of a grudge or animosity upon his part, and they go to show the existence of motive.

Now, a word further upon this doctrine of apparent danger, reading from the case of Wiggins v. The People, decided by the Supreme Court of the United States. I read from the authorities collected in the dissenting opinion in that case, the authorities referred to by Mr. Justice Clifford, who says that unless a party has reasonable ground of apprehension at the time the justification will fail, it being settled law that a b*ear* fear, unaccompanied by any overt act—that is, any outward act—indicative of a supposed intention, will not warrant a party entertaining such fears in killing the other party if there be not actual danger at the time.

"Remarks already made are sufficient to show that a bare fear of danger to life, unaccompanied by an overt act or manifestation indicative of a felonious intent to that effect, will not justify the person entertaining such fears in killing the supposed assailant. Such a defense is not made

out unless all the conditions of the proposition before explained concur in the immediate circumstances which attend the act of homicide."

230 "Courts of justice everywhere agree that neither the bad character of the deceased nor any threats that he may have made forfeits his right to life, until, by some actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person."

"Actual danger of the kind, or a reasonable belief of such actual danger, must exist at the time, else the justification will fail. Repeated threats, even of a desperate and lawless man, will not and ought not to authorize the person threatened to take the life of the threatener, nor will any demonstration of hostility, short of a manifest attempt to commit a felony, justify a measure so extreme."

"Jurists and text-writers appear to concur that antecedent threats alone, whether communicated or not, will not justify a subsequent deadly assault by the other party, unless the party who made the previous threats manifests, at the time of the act, a design to carry the threats into immediate effect."

I think that is sufficient upon the matter of threats. If there is not that state of case which shows that Charles Hermes at the time of the killing was making a deadly assault or an assault to do great violence to defendant upon the deceased really or apparently, or about to make it, and so nearly in the act of making it as that there was no escape from it by the exercise of reasonable care, if his position at that time was one where he was holding his horse by the lines, or holding the plow handles

231 and turning his horse around at the end of the turning row, and his attention was attracted by the defendant speaking, and when he turned he received this shot, then no threats can be considered to excuse or justify or mitigate the act; but upon the other hand, under such circumstances you would have the right to take these threats into consideration to show the existence of special spite or grudge or illwill, or that he killed because of hatred and animosity special in its character against either the old man or some of his boys.

Now, it is not necessary that you should find the existence of motive. That is not necessary. The law does not require it. I will detain you briefly upon that subject. To make the crime of murder it is not necessary to show the existence of motive for the act. If a motive does exist you are never to expect it is adequate or proportionate to the crime, for in the mind of a just man, in the mind of a Christian man, in the mind of a proper thinking man, you never can find motive that is adequate for the cool, deliberate, willful, and wicked taking of a human life—no motive in this world is adequate or proportionate to it. Quoting from the language used by this court in the case of United States v. John Pointer:

"There always is a motive for every human act that is done by an individual who is sane, but some times it is undiscoverable; some times it can not be fathomed; some times because of its inadequate character, because of its utter insignificant nature compared with a great offense of that kind, honest men, whose minds and hearts have not been corroded by the commis-

sion of crime, overlook it; they pass it by. The law does not require
232 impossibilities. The law recognizes that the cause of the killing is sometimes so hidden in the mind and breast of the party who killed, that it can not be fathomed, and as it does not require impossibilities, it does not require the jury to find it."

Again, Mr. Bishop, in his Work on Crim. Proc., sec. 1107, says:

"The particular motive may be beyond the reach of conjecture, and especially of evidence. Hence proof of motive is never indispensable to conviction."

Again, in the case of McLain v. Commonwealth (99 Pa. St., 86, 89), Mr. Justice Mercur, in rendering the opinion of the court, said:

"It was further urged that no adequate motive was shown to induce the accused to commit the crime charged. The court well said the commonwealth was not bound to establish an adequate motive for the alleged crime, and declared, in the words of this court: 'The fact of murder being established, the inability to discover the motive does not disprove the crime.'"

Again, in the case of Clifton v. The State (73 Ala., 473), Mr. Chief Justice Brickell said:

"The presence or absence of a motive for the commission of the offense charged is always a legitimate subject of inquiry * * * but it is not in any case indispensable to a conviction. It is not an element of the burden of proof the law devolves upon the prosecution, whether the agency or connection of the accused is manifested by direct and positive evidence or only by circumstantial evidence, that a motive or inducement to commit the offense should be proved. The criminal act, and the connection of the accused with it, being proved beyond a reasonable doubt, the act itself furnishes the evidence that to its preparation there was some cause or influence moving the mind."

233 Again, reading from the charge of Judge Landon, in the case of Billings, tried in the courts of New York:

"I speak first of motive. No man commits a crime without some motive leading him to do it. That motive may seem to be strong or weak. You are not to inquire whether the motive is one that ordinarily would lead to the commission of the crime charged. It is difficult for a mind that is fortified by the consciousness of its own rectitude to conceive of an adequate motive for any crime. No motive will lead an entirely just man to the commission of any crime. You could not have a motive to take the life of a fellow-man, except in the just defense of your own lives and rights, or in the just defence of the lives and rights of those who your duty it is to defend. But just defense is no crime."

Again, Mr. Wharton in his work upon homicide, says:

"It is sometimes argued, is it likely that one man should kill another for so small an article? Are we not to infer when there is a homicide followed by the stealing of a mere trifle, that the homicide was a result of sudden passion rather than *lucri causa*, or for a mere prejudice, or spite, is it likely that one man would assassinate another and thus expose himself to the gallows? No doubt, when a tender mother kills her child, or a friend kills a friend, and nothing more than the fact of killing is proved, we may be led to infer misadventure or insanity in the motivelessness of the act. But we have no right to make such inference because the motive is

disproportionate. We are all of us apt to act upon very inadequate motives; and the history of crime shows that murders are generally committed from motives comparatively trivial. A man unaccustomed to control his
234 passions and unregulated by religious or moral sense, exaggerates an affront or nourishes a suspicion, until he determines that only the blood of the supposed offender can relieve the pang. So, also, for the smallest plunders murders have been deliberately executed. We have an illustration of this in the trial of Muller, in England, in 1873, for the murder of Briggs. Briggs' watch was seen by Muller in a railway car. Briggs was asleep. The watch was exposed, and Muller killed Briggs by a sudden attack, and succeeded in making his escape: he was afterwards arrested, convicted on circumstantial evidence, and before execution confessed the crime. Until the confession the justice of the conviction was largely criticised, on the ground that the stealing of the watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great. But the reply to this is obvious. Crime is rarely logical. Under a Government where the laws are executed with ordinary certainty, all crime is a blunder as well as a wrong. If we should hold that no crime is to be punished except such as is rational, then there would be no crime to be punished, for no crime can be found that is rational; the motive is never coreelative to the crime, never accurately proportionate to it. Nor does this apply solely to the very poor; very rich men have been known to defraud others even of trifles, to forge wills, to kidnap and kill so that an inheritance might be theirs. When a powerful passion seeks gratification, it is no extenuation that the act is illogical, for when passion is once allowed to operate, reason loosens its restraint."

235 This is the law upon the subject of motive. If this defendant killed this party, Charles Hermes, because the old man, the father of Charles Hermes, had threatened him with violence, or threatened to have something done to him because of his belief that he had done something with his hogs, or killed them, and made threats, that is no defense, that is no mitigation, but that is evidence of malice aforethought; it is evidence of premeditation; it is evidence of deliberation, of a deliberately formed design to kill, because of special spite, because of a grudge, because of ill-will, because of animosity that existed upon the part of this defendant towards these people in the field.

Now, I have been requested to charge you upon the subject of manslaughter. Manslaughter is defined by the law of the United States to be the wrongful killing of a human being, done willfully and in the absence of malice aforethought. There must be out of the case that which shows the existence of this distinguishing trait of murder, to find the existence of a state of case that authorizes a mitigation of the offence from murder to manslaughter. It is an unlawful and willful killing, but a killing in such a way as that the conduct of the deceased Hermes, in this case, at the time he was killed, was not of a character to authorize him to shoot, but that the defendant could so far have the benefit of that conduct provocative in its nature as that he could ask you to mitigate his crime, if crime exists here, from murder to manslaughter. Let us see what is meant by that. It can not grow out of any bare conception of fear. It can not grow out of a state of case where there is a killing because of threats

previously made. because of that which evidences special spite or
236 grudge or ill-will, for if the killing is done on that ground, and if it is shown by the threats, and the previous preparation of the defendant, or the fact of his arming himself, and going back to the field where they were at work, and while there shot Charles Hermes to death, it can not be evidence of that condition; but at the time of the killing there must have been that in the conduct of Charles Hermes in the shape of acts done by him that were so far provocative as to then and there inflame the mind of the deceased, to authorize you to say that it was so inflamed; in such an inflamed condition that the defendant did not act with premeditation; that he did not act from a previously formed design to kill, but that the purpose to kill sprang into existence upon the impulse of the moment because of the provocative conduct of Charles Hermes at the time of the killing, that would be a state of manslaughter.

Now, let us look to the law upon this subject. It says: "Where upon sudden quarrel two persons fight, and one of them kills the other, this is voluntary manslaughter; and so if they upon such occasion go out and fight in a field, for this is one continued act of passion." Now, then, two men are engaged in a conflict with hands or fists, or they go out in a field and thus fight, and one is *reigning* blows upon the other, and that other suddenly, without any previously formed design or without any previous preparation to take life, suddenly draws a weapon and kills, the law mitigates the crime from murder to manslaughter, but if in a case of that kind where they enter into a conflict of that nature and one has prepared himself with a deadly weapon with the purpose of using it in the conflict if occasion offers, that is murder, notwithstanding they may be in
an actual conflict with hands or fists, and the one killed may be
237 *reigning* blows upon the other, and thereby has inflamed his mind, for the law says that the previous selection, preparation, and subsequent use of a deadly weapon shows that there was a purpose to kill contemplated before that affray existed, and whenever that exists, when it is done unlawfully and improperly so that there is no law of self-defense in it, the fact that they may have been in an actual affray with hands or fists would not reduce the grade of the crime to manslaughter.

Now, then, you are to look at the real situation. You are to see what the facts are. You have the positive statements of eye witnesses to this occurrence. The law says that there are two methods of proof, and each of them are legal; each of them are authorized by the law. One is proof coming from those who saw the occurrence transpire and who give it to you. That is one kind of evidence. In this case it is necessary to prove the shooting, to prove the conduct of the party. The man or men who testify as to having seen the shooting of the deceased by the defendant have been before you and have testified; you have their positive evidence before you. That is what is known as positive evidence. Now, then, it is your duty when that sort of evidence is offered not to stop with that, because, let me tell you, there is a more potential factor in a case than that, in the shape of these circumstances, which are motiveless. They have not any motive to commit falsehood. There is nothing preying on their minds to swerve them from a conception of the truth, figuratively speaking. They stand as inanimate facts, yet they speak with most powerful tongue, they enabling a jury who may be trying a case to see what is the truth in

it. You take these circumstances; you take these things standing
238 around the occurrence, and above all you pass upon their probability, their naturalness, their reasonableness. You take the position of this boy when he fell, where he was found by the doctor and his father, brother and others; where he was found with reference to these plow handles; what was the position of the lines, because it is asserted by the defendant here that he started from that plow, that he left that plow, that he was going towards the fence to where there was a gun.

Then you are to pass upon the question as to whether that statement is true or false. You are to pass upon the question as to whether it is reasonable or unreasonable, in the light of the other facts, in the light of positive statements, and in the light of circumstances. You are to ascertain whether the evidence shows the lines were found around his body or not, you having heard the statements of the witnesses as to where they were found. You are to pass upon the question as to whether the statements made by the old gentleman and his son George are true when they state that Charles Heremes, the deceased, was in the act of turning his horse and received the shot while he turned. If that is the state of case there is murder and nothing else in it. If it is true that he had left the plow handles, and if it is further true that there was a gun at the fence, but it was so far from there that the defendant could have avoided any design upon the part of Charles Hermes to use it, if such design existed, then it was his duty to do so. Again, if it was true that there was a gun at the fence, and he had left the plow lines, and was in the act of going to it, and that condition was produced by the wrongful act of this defendant by his going to that place for the purpose of provoking a difficulty,
239 or of seeking deadly vengence, then there could *no* no mitigation from that evidence; there is no self-defense from it. There could be no self-defense in a condition of that kind, because the defendant would be the author of that condition when he could have avoided it by the exercise of reasonable care. Again, if he came up to the fence in a threatening manner, if he made a threatening demonstration with the gun, or a threatening expression, and it was true that there was bad blood between the parties, and Charles Hermes knew that and while he was peaceably and quietly at his plow before Hermes made an effort to go to his gun defendant made a violent demonstration as if to shoot him, then, under this law of self-defense I have given you it would have given him the right to go to his gun for the purpose of defending himself.

Gentlemen, you are the judges of the credibility of these witnesses and these facts coming from them. You are to consider the appearances of witnesses who were before you, their manner upon the stand, their method of giving evidence, the reasonableness, and the probability and the consistency of their statements, and, above all, when you have a material statement coming from a witness you are to see whether it is corroborated by other positive statements or by other facts and circumstances in the case. The defendant has gone upon the stand and made his statement. You treat him the same as you do any other witness. You weigh his statements, and ascertain what they are worth. If they are probable and reasonable and natural when viewed in the light of the other facts and circumstances, they are strengthened; if they are improbable, unnat-
240 ural, and unreasonable in the light of the other facts and circumstances, that condition weakens them. You are to consider his

attitude in the case, his consequent interest which may prompt him to make statements in the case, not that you disregard them because of that relation of his to the case, but you do that impartial justice towards him as a witness as you would do towards all other persons so situated. When you are passing upon the truthfulness or falsity of his statements you are to consider his situation and his surroundings and his interest in the case. The law says in a case of the gravity of this one, where a man is charged with the crime of murder, if the evidence in the case, whether positive or circumstantial, or both combined, is equal in proving power to the testimony of one positive, credible, uncontradicted eye witness, your duty is to believe, your duty is to be convinced, your duty is to believe that guilt exists as well as it is your duty *is* to believe innocence exists, if that is shown. Then, if all the accusatory facts in this case, when considered in the light of the whole of the evidence offered in the case which you find to be true (because you are not bound to regard evidence which is not true) is equal in proving power to the testimony of one positive credible uncontradicted eye witness, your duty is to convict. If it is not equal to that, your duty is to acquit.

Then, I ask you to take all these accusatory facts and see whether a case has been established under this law I have given you; if it is not, the case fails right there. You are to proceed further in the case to see what exculsatory facts have been offered, what evidence showing innocence has
241 been offered, whether or not that testimony is equal in proving power to a state of case that would either entirely destroy the accusatory facts, or so weaken them as to leave the case, when considered in the light of all the evidence which is true, in a state of reasonable doubt. If they do, your duty would be to acquit.

Now, gentlemen, the law says that after looking at the evidence, and receiving the law given by the court, you are first to find from the testimony what is proven in the case, and you then apply to the proposition established the principle of the law which is applicable to it, and if that state of the case is established by the law and the evidence so you have an abiding faith to a moral certainty of the truth of it, your duty is to convict, because it is then proven beyond a reasonable doubt. On the contrary, if it is not proven to that extent, to that degree of certainty, and that there is in the case a real substantial doubt of guilt flowing naturally and reasonably to your minds from the whole of the evidence, your duty would be to acquit. That does not mean that you are to take into consideration any doubt, and act upon it. There are always doubts in everything we do in this world; there is always some sort of doubt or conjecture or surmise that can be used to confront every proposition in life, but reasonable men do not regard them. If they did, they would never move forward or backward, or take any action in this world, but it is the kind of doubt that would control a reasonable man when acting upon a matter of importance, a concern of great importance that affect another, that is to control you. It is the kind of doubt, or doubts, for which good reasons can be given that
are to have such force as to induce us to act upon them, and acquit.
243 The proof in this case (and I do not say this for you specially, because you saw the defendant; he stands before you) from the declarations of the defendant himself is that he is 17 years old. The law holds a person of that age accountable for the crime of murder. The

law says that every citizen is to be protected against acts of violence which destroy life, and it does not make any difference whether the person committing those acts of violence is 17 years of age or 70; they stand upon the same plane in that particular, and you are to determine this case upon the law and upon the evidence offered. You are neither to be swayed to the right or left by any false sympathy or any misconception of it. Your duty confronts you. You have sworn to perform it. I ask you to perform it by the law and the testimony. If the evidence shows guilt beyond a reasonable doubt of the crime of murder or manslaughter your duty is to find that such guilt exists; if it does not, your duty is to acquit the defendant.

You are required to make a finding on the merits of this indictment. You are required to make a finding upon this plea of former jeopardy, in the form I have given you—that is, "We, the jury, on the issue raised by the special plea of former jeopardy, upon the facts presented to us as evidence, find the defendant has not by the trial in this case having been heretofore commenced, been put in jeopardy, and we find the issue raised in this case on the special plea of former jeopardy for the United States."

You will retire, gentlemen, to consider your verdict.

Mr. MELLETTE (of counsel for defendant). We have some exceptions we desire to file to the charge.

The COURT. Yes; you may file them.

244 Whereupon the defendant at the time excepted to the charge of the court, which exceptions are as follows:

1. Excepts to the court's charge as to the law governing the plea of former jeopardy.

2. Excepts to this language in charge:

"The state of facts which I have stated to you is not such as would prevent you from trying defendant upon his plea of not guilty and rendering a verdict upon the merits of the case."

3. Excepts to the charge of the court wherein it was expressed, "that the plea of former jeopardy was not well taken, and that under the facts as stated by the court the defendant had not been in former jeopardy."

4. Excepts to this language: "Your duty will be to find the plea of former jeopardy in favor of the Government."

5. The defendant excepts to all and singular the propositions of law laid down by the court, and because said charge was delivered orally.

6. Excepts to all that part of the charge defining the word willfully as used in the indictment.

7. Excepts to that part of the charge defining the word intentionally, or as to how the jury should find the intent of the party charged.

8. Excepts to that part of the charge wherein the court gave the law as to what malice aforethought is, how it was to be proven or established, and how applied to the facts established.

9. Excepts to the third definition of malice aforethought given by the court, and to the giving of three separate definitions of malice aforethought, as having a tendency to confuse the minds of the jurymen.

245 10. Excepts to the charge of the court as to what the law presumes malice from the use of a deadly weapon. "That if its use was not authorized by law it is presumed to have been used in malice. And that if self-defence and manslaughter are eliminated then malice is to be presumed."

11. Excepts to all that part of the charge as the inference from the use of a deadly weapon in order to show malice aforethought.

12. Excepts to the language of the court in giving law of self-defense in stating the effect of a man arming himself and going to the place of difficulty, and in reading from a case, purporting to give the law governing a state of case where accused goes to place of difficulty with deadly weapons because the law and facts in said case read are not applicable.

13. Excepts to the charge of the court as to the effect of defendant arming himself with a gun and going back to place of killing; in failing to state that defendant had a right to arm himself if he believed his life was in danger, and that his going back by the field if it was on his reasonable way home, having the gun merely to protect himself in case of an attack, he would not be cut off from the right of self-defense.

14. Excepts to the court reading from a dissenting opinion of the Supreme Court of the U. S. by Mr. Justice Clifford, and the authority cited by said opinion.

15. Excepts to the court stating that he reads from the authorities cited in a dissenting opinion in the Supreme Court of the United States on the subject of threats.

16. Excepts to the court's charge as to the effect of threats in this case and the law governing threats.

246 17. Excepts to the charge of the court as to the proof of motive in this case and in stating that there is no adequate motive for the committing of a deliberate murder.

18. Excepts to the charge of the court giving the law of manslaughter.

19. Excepts to the charge of the court in giving the law of manslaughter because in stating: "If defendant prepared himself and went to place of killing he would be guilty of murder and not manslaughter." And in not giving the law governing the case where a man or person charged arms himself simply for the purpose of protection, and in good faith goes to or by place of killing.

20. Excepts to all that part of the charge as to the law of manslaughter because it expressed the law fully which would not make it manslaughter, but murder and did not in a like manner elaborate the law which would have made it a case of manslaughter.

21. Excepts to the charge of court as to the age of defendant, and expressed that you are not to be swayed from your purpose by any false sympathy. If it is murder, say so.

22. Excepts to the charge of the court as a whole, because it is prolix, confusing, abstract, argumentative, and misleading.

These were all the exceptions to the charge of the court that were taken at the time the charge was given and presented to the court in the presence of the jury.

The jury then retired to consider their verdict and in a short time returned into court the following verdict:

"We, the jury on the issue, raised by the special plea of former jeopardy, upon the facts presented to us as evidence, find the defendant has not, by the trial in this case, having been heretofore commenced, been put

247 in jeopardy, and we find the issue raised in this case on the special plea of former jeopardy, for the United States."

(Signed) JNO. B. MORRIS,
Foreman.

"We, the jury, find the defendant, Thomas Thompson, guilty of murder as charged in the within indictment."

(Signed) JNO. B. MORRIS,
Foreman.

The defendant then filed his motion for a new trial, which is as follows:

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
THOMAS THOMPSON. } Motion for new trial.

Comes the defendant, Thomas Thompson, and moves the court to set aside the verdict rendered herein against him, and grant him a new trial for the following reasons:

First. Because the court erred in discharging the jury empaneled for the trial of this cause on November 23rd, 1893, before said jury had arrived at a verdict, after said jury had been duly sworn, the witnesses for the prosecution and defense had been sworn and put under the rule, the statements of the case made by the counsel for the Government and defendant, respectively, and one witness examined in chief for the Government; for the reason that James A. Johnston, a member of said jury, had been a member of the grand jury that returned the indictment herein into this court; the said juror, James A. Johnston, having answered all necessary questions upon his voire dire qualifying him to sit as a juror in said
248 cause, and was not asked after the discovery of the fact that he had been a member of said grand jury, as to whether he had heard the evidence before the said grand jury or had formed or expressed an opinion in the case.

Second. Because the clerk erred after the discharge of the first jury empaneled for the trial of this cause in overruling the defendant's motion for a jury from the body of the district for the trial of this cause, which said motion is as follows:

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
THOMAS THOMPSON. } Murder.

Comes the defendant, Thomas Thompson, and states that of the list of jurors served upon him from which are to be selected the jury to try this case, but seventeen are of the regular panel of jurors for the present term of this court, regularly drawn from a box as provided by law, viz: from No. 1 to and including No. 17 on the said list as aforesaid served upon defendant, which said list is hereto attached and made a part of this motion, and that the remaining twenty-eight (28) names on said list were summoned by the marshal of this district from the bystanders by order of the court, which said order of the court is as follows:

United States vs. Thomas Thompson—Ordered by the court that the marshal summon 28 legal voters of the West. Dist. of Arkansas to be used as talesmen in the trial of the above-named case.

249 That all of said jurors so summoned by said marshal are residents of the city of Fort Smith, Arkansas, in this district. That a large number of the regular panel of jurors for the present term of this court are disqualified for the trial of this case because of the fact that a jury was empaneled heretofore at the present term of this court in this cause, and a portion of the evidence heard, and not by reason of its notoriety throughout the district. Wherefore defendant prays the court for a jury from the body of the district for the trial of this cause.

BARNES & MELLETTE,
Att'ys for Def't.

Third. Because the court erred when this case was called for trial the second time in permitting the clerk, over the objections of the defendant, to call as jurymen for the trial of this cause the following-named persons, to wit, Wilson G. Gray, Wm. M. Perkins, and Isaac B. Sloan, and in accepting them as qualified jurors, from which was to be selected the jury to try this , and in requiring said defendant to challenge said jurymen peremptorily or accept them for the trial of this cause, the names of the aforesaid persons not being on the certified list of jurors served upon this defendant on the 27th day of November, 1893, which said list of jurors, and certificate of clerk attached thereto so as aforesaid served, is as follows:

Wm. Nail	Ozone	Johnson.
Jno. Smith	Boston	Madison.
Wm. J. Weaver	Ft. Smith	Sebastian.
John W. Yoes	"	"
Adam Endres	Enterprise	"
Ambrose Eubanks	Pauline	Franklin.
Geo. W. Goodwin	Huntington	Sebastian.
Wm. R. Gabbard	Aurora	Madison.
Wm. C. Harrison	Vesta	Franklin.
Daniel Harrison	Ft. Smith	Sebastian.
Wm. F. Jones	Staunton	Washington.
250 Wm. S. Lively	Vesta	Franklin.
Jno. B. Morris	Goshen	Washington.
Salem W. Oliver	Potter	Polk.
Robert Spoon	Van Buren	Crawford.
Henry Simpson	Fort Smith	Sebastian.
Joseph Ritter	"	"
Henry Williams	"	"
Robt. Walker	"	"
John D. Wilson	"	"
Jerry Washington	"	"
Frank Reed	"	"
Wm. F. Henderson	"	"
Jas. W. Rice	"	"
Wm. S. Birnie	"	"
Hence Owens	"	"
Jno. R. Wren	"	"
Granville Krenshaw	"	"

Berry Hogue	Fort Smith	Sebastian.
John A. Blackburn	"	"
Henry Dennis	"	"
Horace E. Gordon	"	"
Wm. Patterson	"	"
John A. Miller	"	"
Robt. F. Stegall	"	"
Edward C. Reichart	"	"
Elmo Caruthers	"	"
John Reutzel	"	"
Geo. L. Lewis	"	"
Geo. H. Lyman	"	"
Geo. Maledon	"	"
Walter Evans	"	"
Chas. Ahrens	"	"
Geo. W. Barnnes	"	"

UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the 8th circuit, hereby certify that the foregoing annexed to this certificate is a true and correct list of jurors, duly summoned and in attendance in the case of Thomas Thompson, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court at Fort Smith in said district this 27th day of Nov., A. D. 1893.

[SEAL.]

S. WHEELER,
Clerk,
By I. M. DODGE,
D. C.

251 Fourth. Because the court erred when empaneling the second jury for the trial of this cause in overruling defendant's challenge to twenty-eight jurors presented for the trial of this cause, which said challenge is as follows:

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
THOMAS THOMPSON. } Murder.

Comes the defendant in person and by his attorneys and comes the jury summoned in this cause, and the said defendant challenges twenty-eight (28) of said jurors for the reason that they are not of the regular panel of jurors for the present term of this court; that they are not from the body of the district, but are all residents of the city of Fort Smith, in said district; that they were not drawn from the box from which the names of the jurors are usually drawn, but were summoned by the marshal of this district from among the bystanders by order of the court; that the names of the twenty-eight (28) jurors so summoned by the marshal are on the

certified copy of the list of jurors served upon defendant herein on the 27th day of November, 1893, from No. 18 to No. 45 of said list, which said list so certified is hereto attached and made a part of this motion. Wherefore defendant prays that said panel of jurors be quashed as to the said 28 names so as aforesaid summoned.

THOMAS THOMPSON,
By BARNES & MELLETTE,
His Attys.

See certified list of jurors referred to in above challenge, set forth in the third paragraph of this motion.

Fifth. Because the court erred in using the following language in the examination of the witness Dr. G. W. Bell:

COURT. "How far did you say the body was from the plow?"

252 Answer. "Right by the plow handles."

COURT. "Right where a man would stand if he was hold of the plow handles?"

Sixth. Because the court erred in giving the law upon the plea of former jeopardy in telling the jury: "That under the law the state of case it has named is not such an one as gives the defendant the right to claim that he has been in such jeopardy formerly as to prevent you from passing upon the merits of this case and to determine his guilt or innocence from the law and the evidence in this case. (Typewritten page 3 of charge.)

Seventh. Because the court erred in charging the jury upon the plea of former jeopardy in saying: "That I can state to you that, upon the facts as I have enumerated them, your duty will be to find the issue raised by the special plea of former jeopardy, for the Government in this case, and when you have made your finding upon that, you will then proceed to consider the charge of murder upon the merits of the case." (Typewritten page 12 of charge.)

Eighth. Because the charge of the court herein was delivered orally and taken by the court stenographer.

Ninth. Because the court erred in giving the law as to the term wilfully as used in the indictment. (Typewritten page 14 of charge.)

Tenth. Because the court erred in giving the law as to the intent of the party charged and as to how intent should be proven.

Eleventh. Because the court erred in giving the law of malice aforethought, the meaning of the term, how it was to be proven, and how applied to the facts in this case, and in saying:

253 (1) "Now the law expresses its meaning of this phrase in several ways. It says in one definition that it is the doing of a wrongful act without just cause, in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give a right to the party to defend against it, or that it was done in the absence of mitigating circumstances." (Typewritten page 20 of charge.)

(2) "Again, the law gives another definition. It says it is the doing of a wrongful act without just cause or excuse and in the absence of mitigating circumstances, and when it is done in that way, it shows that he who did it had a heart void of social duty and a mind totally bent on mischief." (Typewritten page 20 of charge.)

(3) "Again, the law defines this characteristic of the crime of murder, and it tells us how to find it when it says it can only be found by circumstances, because malice aforethought, like wilfully, is something which exists in the mind, that is necessary to be found to make up the elements of the case, and as you can not get into the mind to know what is going on there, and as you could not tell what is transpiring there if you could get into it, you must learn it in some other way; and there must be some rational way by which you must learn it—some way which rational men would adopt—because we are not authorized to adopt any other method than that which is reasonable in arriving at conclusions, and there is a reasonable way by which men may arrive at conclusions." (Typewritten page 21 of charge.)

(4) "Again, the law says that motive is evidenced by the existence of a wicked, depraved, and malignant heart, a purpose to do a wilful act. It may be either expressed or implied in the law. Express malice is
254 where one with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced bu external circumstances, discovering that inward intention, as lying in wait, antecedent menaces, former grudges, concerted schemes to do another bodily harm. So in many cases where no malice is expressed the law will imply it, as when a man wilfully poisons another; in such a deliberate act the law will presume malice, and if a man kills another suddenly without any, or without considerable, provocation, the law implies malice, for no person, except of abandoned heart, would be guilty of such an act upon a slight, or upon no apparent, cause." (Typewritten pages 23 & 24 of charge.)

(5) "Again, the law says that malice is an intention to do bodily harm. If a man by his acts, such as shooting at another, manifests an intention to do bodily harm, and that intention as manifested takes away the life of another, if there is nothing in that case which gives him the right to do that bodily harm under the law or no condition surrounds him that mitigates that crime, by the rules of the law, the very intention that surrounds him makes malice aforethought, that is, in the absence of these other two conditions. It means a formed design to do mischief. It has also been defined as a deliberate intent to kill." (Typewritten page 24 of charge.)

(6) "Malice is an intent of the mind and heart, the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act or which reduce the grade of the crime. Whenever a wrongful act is done, without just cause or excuse or in the absence of mitigating circumstances, which produces death it is murder." (Typewritten page 26 of charge.)

(7) "Malice is an intent of the mind and heart There is never presented to the jury direct evidence of what was the intent of the man's
255 heart at the time. You can not tell the condition of the mind by direct proof, bearing in mind the distinction between these two kinds of evidence—positive or direct proof and circumstantial evidence. Positive or direct proof is the proof which shows the existence of the very thing itself that you are hunting for." (Typewritten page 26, charge.)

(8) "Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design then it is not necessary

to prove that such design existed for any definite period before the fatal blow. From the very fact of a blow being struck, we have a right to infer, as a presumption of fact, that the blow was intended prior to the striking, although at a period inappreciably distant. We frequently find the statement laid down in reported cases and by text writers that malice is to be inferred by the use of a deadly weapon. This court always modifies that, and I call your especial attention to the modification. Malice is to be inferred from the use of a deadly weapon, if the evidence shows that the use of it in a deadly way was not authorized by the law of self-defence or the evidence shows that it was not an act, that because of the conduct of the party killed, at the time of the killing, that was mitigated under the law. If these two conditions are eliminated from the case by the evidence showing the use of a weapon, and the wilfull use of a deadly weapon, if these conditions are eliminated it shows the existence of malice aforethought." (Typewritten page 29, charge).

Twelfth. Because the court erred in giving the law of self-defence in stating the effect of a man arming himself, and going to the place of the difficulty, in saying, "the law says we may deprive ourselves of that right by our own wrongful conduct, and that we may make no mistake let us go to the law to see under what circumstances a man may deprive
256 himself of the right; and in order that you may have an exact illustration I read to you a short case, that of Vaiden vs. Commonwealth, 12th Gratt., 717; Harrigan and Thompson cases on self-defense, 222.

"The deceased and Vaiden were at the latter's house one evening drinking and playing cards together. Some high words passed between them growing out of the deceased's charging Vaiden with cheating. Vaiden's wife told the deceased that he had promised to make no "fuss," to which he assented, said "good night," and left the house. He did not go away, however, for he was heard in the yard swearing very loudly and apparently much enraged. Hearing him Vaiden took up his gun and started to the door, but was induced by his wife not to go out. Guns were apparently used instead of walking sticks in that neighborhood, for just then the deceased called through the window that he wanted his gun, and the weapon was handed to him through the window by Mrs. Vaiden. The deceased then walked away accompanied by two other persons and by a son of Vaiden's, who went with the party as far as the fence to let them through the draw bars. As they stood at the fence talking, Mr. Vaiden appeared with his gun, seeing which the deceased jumped over the fence, took hold of his gun by the barrel as if to use it as a club, and rushed at Vaiden. The latter called out that if he didn't stop he would shoot him. The warning went unheeded, and when the deceased got within a few feet of him, Vaiden, falling back a few steps, fired. The deceased then struck Vaiden two blows with the breech of his gun and staggeredback mortally wounded, dying a few hours afterwards. Vaiden, indicted for the killing, set up the plea of self-defense, but the court held that he, being responsible for the altercation in following the deceased with his gun after he had departed from the house, could not avail himself of that plea, and he was convicted." (Type-written pages 41 & 42, judge's charge.)

257 Thirteenth. Because the court erred in failing to charge the jury that defendant had a right to arm himself if he believed his life was in danger, and that his going back by the field, if it was his only practicable way home, having the gun merely to protect himself in case of an attack, he would not be cut off from the right of self-defense if Hermes made a deadly attack upon him; but on the contrary, in telling the jury that "the law of self-defense gives him the right to arm himself for the purpose of defending himself as long he is in the right. But if he has a conception that deadly danger may come upon him, but he is away from it so that he can avoid it, his duty is to stay away from it and avoid it, because he has no right to go to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty or with the intent of having an affray. (Typewritten page 43, court's charge.)

Fourteenth. Because the court erred in giving the law as to previous threats and the law governing threats, and in saying "but if threats are made and there is an absence from the case of that which indicates (a deadly design or design to do great bodily harm, really or apparently)—the condition which I have given you where you can use them as evidence, you can only use them and consider them for the purpose of showing the existence of special spite or ill will or animosity upon the part of the defendant. (Typewritten page 44, charge of court.)

Fifteenth. Because the court erred in giving the law as to the proof of motive and in saying "So, also, for the smallest plunders, murders have been deliberately executed. We have an illustration of this in the trial of Muller, of England, in 1873, for the murder of Briggs. Briggs watch was seen by Muller in a railway car; Briggs was asleep; the watch
258 was exposed and Muller killed Briggs by a sudden attack and succeeded in making his escape. He was afterwards arrested and convicted on circumstantial evidence, and before execution confessed the crime. Until the confession the justice of the conviction was largely criticised on the ground that the stealing of the watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great." Typewritten page 50, court's charge.

Sixteenth. Because the court erred in giving the law of manslaughter in saying: "For the law says that the previous selection, preparation, and subsequent use of a deadly weapon shows that there was a purpose to kill contemplated before the affray existed, and whenever that exists, when it is done unlawfully and improperly so that there is no law of self-defense in it, the fact that they have been in an actual affray with hands or fists would not reduce the grade of the crime to manslaughter." (Type written pages 52 & 53, court's charge.)

Seventeenth. Because the court erred in giving the law of manslaughter in saying: "It cannot grow out of a state of case where there is a killing because of threats previously made, because of that which evidences special spite, or grudge, or ill-will. For if the killing is done on that ground and if it is shown by threats, and the previous preparation of the defendant, of the fact of his arming himself and going back to the field where they were at work, and while there shot Charles Hermes to death it can not be evidenced by that condition" (which would reduce the crime to manslaughter). (Typewritten page 53, court's charge.) And in not stating the law governing the state of facts as set forth by the defendant

in his testimony, wherein defendant said in substance, "that he
259 thought that possibly deceased and his father and brother might offer him violence, and he armed himself for protection in case they did so, and that his only practicable route home was the road which ran by the field where the killing occurred, and that he did not go that route for the purpose of having a difficulty with deceased, but because it was his only road home. (Typewritten evidence.)

And because the court gave numerous illustrations in giving the law of manslaughter showing what would not reduce the killing to that grade of crime and did not in like manner illustrate what state of fact would make a case of manslaughter.

Eighteenth. Because the court erred in charging the jury: "The proof in this case from the declarations of the defendant is that he is seventeen years old. The law holds a person of that age accountable for the crime of murder. The law says that every citizen is to be protected from acts of violence which destroy life, and it does not make any difference whether the person committing those acts of violence is seventeen years of age or seventy; they stand upon the same plane in that particular and you are to determine this case upon the law and upon the evidence offered. You are neither to be swayed to the right or to the left by any false sympathy or any misconception of it." (Typewritten page 58, court's charge.)

BARNES & MELLETTE,
Attys. for Deft.

Which motion for a new trial was by the court overruled, the decision of the court in overruling the same being as follows:

260 UNITED STATES
vs.
THOMAS THOMPSON.

Ruling of the court on motion for a new trial.

The first cause for a new trial embraces the same subject-matter that is presented by the court to the jury in its charge on the subject of former jeopardy. Defendant's counsel in the last part of this alleged cause say that Mr. Johnson, after the discovery of the fact that he had been on the grand jury that indicted the defendant, was not asked as to whether he had heard the evidence taken by said grand jury or had formed or expressed an opinion. It will hardly do now for counsel to say he was a qualified juror, for they refused to consent to proceed with the trial of the case with Mr. Johnson on the jury, and of course because in their judgment he was disqualified. It was wholly unnecessary to ask Mr. Johnson as to whether he had heard the evidence or had formed an opinion from such evidence, for he said, as reported on page 9 of the record of the proceedings, "I did not recognize the name when the jury was made up, but I recognized this witness when he got on the stand." This shows he heard the evidence. Was it then necessary to ask him in the face of this fact whether he had formed an opinion. The law does authorize us to presume some things. It authorizes us to presume that a grand juror does his duty. It authorizes us to presume he is competent to do it. Acting with the grand jury as he said he did, if he did his duty and was

competent to do it, he must have had an opinion when he heard
261 the evidence. It would be little less than an insult to an intelligent man to ask him if he had formed an opinion when he said that he was on the grand jury and heard the evidence and acted with such grand jury. The counsel now in effect complain because Mr. Johnson might still have been a competent juror, but, as I have said, they objected to proceeding with the trial to a final hearing after Mr. Johnson had been interrogated. The question was fairly and fully put to them if they would waive any objections to Mr. Johnson and proceed with the trial, and they answered in the negative. They must have been fully satisfied of Mr. Johnson's entire disqualification to set as a juror in the case. What court would let a verdict of guilty stand in the light of such facts affecting the competency of a juror? To do so would be rank injustice to a defendant on trial for his life. There was no other way but either to proceed with the trial or to direct a verdict for the defendant on the ground that he was in jeopardy, or to withdraw the objectionable juror and fill his place with another one who was competent, or dismiss the panel and empanel a new jury. There is no difference in effect between the two last methods, except a dismissal of the whole panel is clearly the best method of procedure. Upon the authority of Simmons v. U. S., 142 U. S., 148, the court discharged the panel and empanelled a new jury. The whole subject embraced in this cause is fully presented in the charge of the court to the jury, and the authorities sustaining the action of the court are there fully set out, and nothing further need be said on this cause for a new trial.

263 As to the second cause for a new trial: It is sufficient to remark that when the court found a large number of the regular panel of jurors disqualified it had to have a panel to select a jury from, for the regular panel was exhausted, for the reason already given, and to get this jury it followed the method prescribed by the Supreme Court of the United States in the case of Lovejoy v. U. S., 123 U. S., 171. Due service of this list was had on the defendant. Aside from the rule prescribed in the above case, the selection of the jurors as to the part of the district they were selected from is, by section 302 Rev. Stat. U. S., very largely in the sound discretion of the court. Said section is as follows:

"Jurors shall be returned from such parts of the district from time to time as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur unnecessary expense or unduly burden the citizens of any part of the district with such services."

The counsel do not complain that the panel was made up of partial or incompetent men. They thus impliedly admit they were entirely qualified. There can be no error in this action of the court.

The third cause for a new trial is so drawn as that an appellate court not acquainted with the fact might be misled by it. The impression might be formed that defendant had not had any notice served upon him of the three jurors called from the regular panel, when such is not the facts.

The three jurors—Wilson D. Gray, William M. Perkins, and Isaac
264 B. Sloan—were on the regular panel of jurors for the term, and a list of this panel was duly and legally served on the defendant on November 8th, more than two entire days before the trial. They were examined in the presence of the defendant and found duly qualified. Why,

then, were they not competent to be called as jurors? The defendant urges no objection to their qualifications. There is no law requiring that all of the list of jurors from which the jury of twelve is to be selected need be served at the same time. They might be served one at a time, and it would be perfectly regular under the law.

The only requisite of the law is that the body of men from which the panel to try the case is selected shall be served on the defendant more than two entire days before the trial commences. A full list of the regular panel of jurors was duly and legally served on the defendant at the commencement of the term, but because the trial was once commenced a large number of this regular panel was disqualified, because they had heard part of the evidence in the case. Those of the regular panel who were not disqualified were certainly proper persons to be called as a part of the panel of thirty-seven, from which the jury was to be selected. As I have said, it was found that there was not a sufficient number of the regular panel of jurors qualified to make up the panel of thirty-seven from which the jury were to be selected; accordingly others were summoned on the order of the court, and a list of these other jurors, together with a number of the regular panel, were served on the defendant more than two entire days before the case was called for trial. 'Tis true that Messrs. Gray, Per-
265 kins, and Sloan were not on this list, nor was it necessary they should be, for their names were on the first list served. It is submitted that the method of procedure adopted by the court is fully sustained by the law, and especially by the case of Lovejoy v. U. S., supra, and there can be no error growing out of the action taken in this regard.

What I have said relating to the second cause for a new trial is equally applicable to the fourth cause. There can be no error in the fifth cause, for the court, in the exercise of its discretion, has a right to ask questions of witnesses, that the truth may be elicited, nor is it confined in such an examination to questions that are not leading. Mr. Wharton, in his Criminal Evidence, section 452, says:

"The trial court at any period of the examination may put questions to the witness for the purpose of eliciting facts bearing on the issue, and a witness may be even recalled for this purpose, or a witness not called by the parties may be called and examined by the court; nor is the court as to evidence bound by the rule excluding leading questions."

The sixth and seven causes may be considered together. They embrace substantially what the court said in charging the jury upon the question of jeopardy. What it said was based on the facts which occurred in the trial proceedings in the same court and in the same case. Of these facts it was the duty of the court to take judicial notice. Dawson v. Dawson, 29 Mo. App., 523; State v. Bowen, 16th Kansas, 475; Pagett v. Curtis, 15 La. Ann., 451; Brewster v. State, 19 Wis., 539. These were facts established under the law, and being established because they were
266 of such a character that the court must take judicial notice of them as being true, and tell the jury they were true. What sense would there be in the court telling the jury if it found these facts true it would find so and so, when it had just told them, as it was its duty to do, the facts were true, and that it was its duty to judicially note them as such? The whole charge on the subject of former jeopardy is abundantly sustained by all the authorities set out in the charge of the court, and there can be no error here.

The eighth cause for a new trial is that the charge of the court was delivered orally. I am unable to see why this objection is made, for the court has a right to deliver it orally if it desires to do so. There is no law requiring it to be in writing. The court is unable to say what is meant by the 9th and 10th causes for a new trial, for no errors are specifically named. In fact, all the objections to the charge are of a general character. The counsel content themselves by saying there was error without naming it.

The eleventh cause for a new trial is a fair sample of all the objections to the charge. It asserts the court erred in giving "the law of malice aforethought, the meaning of the term, how it was to be proven, and how applied to the facts." It then sets out certain paragraphs in the charge, but it wholly fails to show in what way, or in what particular, the court erred in giving the law of malice aforethought, the meaning of the term, how it was to be proven, and how applied to the facts. By simply saying the court erred does not show how it erred, does not point out any
267 specific error; nor does setting out part of the charge, and calling it an error, show wherein the error lies. The counsel should show why it is an error; what particular principle of law has been violated by the court, or why a principle of the law was not applicable to the case.

The eleventh and twelfth causes for a new trial set out parts of the charge, but like all the causes that are based on the charge of the court they set out the charge in a fragmentary and disconnected way. Often, by the omission from the motion of the most material parts of the charge, the meaning and force of the same is destroyed. Possibly, if the charge had been given as set out in the motion, it might have been erroneous; but in my judgment it is altogether free from any error when taken as it is and as it was given.

The thirteenth cause for a new trial is based on a state of case which I think is not warranted, as the court did charge on the point mentioned in the cause for a new trial, and did charge that the law of self-defense gave the defendant the right to arm himself with the purpose of defending himself.

The fourteenth cause is based on what the court charged the jury on the subject of previous threats. The whole of what the court said as shown by the charge shows clearly to my mind that no error was committed when treating of the subject of threats.

The fifteenth cause grows out of what the court said on the subject of motive. Here again we can not get an intelligent understanding of what the court said from what is set out in the motion, but on going to
268 the charge is very clear that the law on this subject was correctly declared.

The sixteenth cause as set out in the motion relates to the law as given by the court on the subject of manslaughter, but it might more properly be named a proposition relating to a state of case where manslaughter does not exist. The part of the charge referred to in substance asserts that if a party previous to a killing selects, prepares, and subsequently uses a deadly weapon in such a way that his act is not a defensive act there can be no manslaughter, for the selection, preparation, and such use of a deadly weapon shows deliberation, shows premeditation, and manslaughter can

not exist where these elements are found. This proposition as set out in the motion is most clearly law, but the connection of the proposition is lost by its being set out in a disjointed way, disconnecting it from the remainder of the law, as given on the subject of manslaughter. The charge shows that the law upon that subject was clearly, fully, and, as I believe, correctly given.

The seventeenth cause for a new trial complains of the court for not charging full enough on the right of the defendant to arm himself in self-defense. It will be observed that the court in the charge fully stated that proposition. In the part of the charge set out in the seventeenth cause for a new trial the court was speaking of the law of manslaughter, and it told the jury what sort of a case it could not grow out of, and the case as put by the court is certainly one out of which manslaughter could not spring. The case where a man may arm himself that he may defend himself was correctly stated in the charge.

269 The eighteenth cause relates to the fact that the court told the jury that the defendant of the age of seventeen years was to be held accountable under the law for crimes the same as though he was older. This part of the charge had reference to an effort, as the court believed, on the part of counsel to unduly invoke the sympathy of the jury and lead them away from the case because of the age of the defendant. He was fully competent, legally and morally, to commit the crime of which he was convicted. Now, it is not improper here to remark that the evidence of two credible, positive eyewitnesses, the father and brother of the deceased, show a state of case that can be nothing but murder, nothing but a case of cold-blooded assassination, as it shows that defendant passed by the cornfield where the witnesses and the deceased were at work plowing corn, and he saw they were unarmed; he gave as he rode away an Indian whoop of defiance, which means death if opportunity offers. He armed himself, came back within shooting distance of his victim, and shot him dead while he was turning his horse at the end of a corn row to start back, plowing another row. This was done as an act of revenge, because the father of the murdered boy had accused the defendant of killing his hogs. True, the defendant tells another story, but in this story he is contradicted by the positive eye witnesses, as well as by all the reliable circumstantial facts. Such facts fully contradict him, and completely sustain the father and brother of the deceased. The dead boy was found with the plow lines around his body. He was plowing with these lines over his shoulder; they were found around his body when he

270 lay dead. Dr. Bell says he found the body of the dead boy "right at the plow handles, in a position he would be in if he was holding to the handles, or about that position." Then he could not have been advancing towards the defendant, but he must have been shot just as Mr. Hermes, the father, and young Hermes, the brother, say he was shot. The charge of the court fully gives the law applicable to this state of case, as well as the law applicable to the case stated by the defendant. The jury heard the evidence; they saw and heard the witnesses; they listened to their statements; they were not misled, but properly guided by the charge of the court.

In the interest of justice it may be well to remark in this connection, if a charge of a court is to be taken and considered in disjointed and fragmentary parts we might as well despair of having any case where the verdict would not have to be set aside, or where the judgment based upon it could be sustained by the appellate court, for no case can be found where you may not take parts of a charge of a court and disjoint and disconnect them from the remainder of the charge and find error. You may do the same with the ten commandments. If a rule of proceeding of this character is to prevail, all cases may be reversed; but if the whole charge states the law, the verdict should stand, and justice demands that the judgment should remain untouched. The charge in this case taken together, and considered fairly and reasonably, clearly, distinctly, fully, and correctly, states the law as it is written and known on every proposition invoked in the case. No wrong was done the
271 defendant thereby; no injustice was wrought against him. The verdict is a righteous and just one, under the law of the land, as it was declared by the court, and it is beyond any question sustained by the facts, and neither it, or the judgment following it, should be interfered with by this court or any other.

The motion for a new trial is overruled.

272 To which action of the court in overruling defendant's motion for a new trial the defendant at the time excepted, and defendant then filed his motion in arrest of judgment, which said motion is as follows:

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
THOMAS THOMPSON. } Murder.

Comes the defendant and moves the court to arrest the judgment herein. Because on the 23rd day of November, 1893, a jury was duly empaneled, sworn, and charged in this cause; the witnesses for the prosecution and defence were duly sworn and put under the rule, the statements of the case made by the counsel for the prosecution and defendant, respectively, and one witness for the prosecution was produced and examined in chief; whereupon the court announced that James A. Johnston, a member of the jury trying the case, had been a member of the grand jury which had presented the indictment herein into court. And defendant refusing to waive any rights in the premises—the court ordered said jury discharged from the further consideration of the case before it had arrived at a verdict, for the reasons above set forth. And defendant says that by the proceedings above set forth he was placed in jeopardy and he files this his motion in arrest of judgment.

THOMAS THOMPSON.
By BARNES & MELLETTE.

The court overruled the same, to which action of the court the defendant excepted.

273 Whereupon the court sentenced the defendant to be hanged, to which judgment and sentence of the court defendant excepted, and now tenders this his bill of exceptions, and prays that the same be signed and made a part of the record in this case.

I. C. PARKER,
U. S. Dist. Judge, presiding in circuit court at the time of the trial of Thompson.

(Endorsed on back.) Bill of exceptions of defendant. Filed Jan. 15, 1894. S. Wheeler, clerk. By I. M. Dodge, D. C.

274 In the circuit court of the United States for the western district of Arkansas.

THE UNITED STATES, PLAINTIFF,
vs.
THOMAS THOMPSON, DEFENDANT. } Murder.

Assignment of errors.

The defendant in the above-entitled cause, Thomas Thompson, files this assignment of errors committed on the trial of the above cause, to wit:

First. It was error in the court to discharge the jury empanelled for the trial of this cause on November 23rd, 1893, before said jury had arrived at a verdict after said jury had been duly sworn; the witnesses for the defense and prosecution had been sworn and put under the rule; the statements of the case made by the counsel for the Government and defendant, respectively, and one witness examined in chief by the Government. For the reason that James A. Johnson, a member of said jury, had been a member of the grand jury that returned the indictment herein into court. The said juror, James A. Johnson, having answered all necessary questions upon his voire dire, except as to whether he had been a member of said grand jury or not, qualifying him to sit as a juror in this cause, and was not asked after the discovery of the fact that he had been a member of said jury as to whether he had heard the evidence before the said grand jury, or had formed or expressed an opinion in the case.

275 Second. It was error in the court, after the discharge of the jury first empanelled for the trial of this cause in overruling the defendant's motion for a jury from the body of the district, for the trial of this cause, which said motion is as follows:

"In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
THOMAS THOMPSON. } Murder.

"Comes the defendant, Thomas Thompson, and states that of the list of jurors served upon him from which are to be selected the jury to try this case, but seventeen are of the regular panel of jurors for the present term of this court, regularly drawn from a box as provided, to wit: From No. 1

to and including No. 17 on the said list, as aforesaid, served upon defendant, which said list is hereto attached and made a part of this motion. And that the remaining twenty-eight (28) names on said list from No. 18 to and including No. 45, the last name on said list, were summoned by the marshal of this district from the bystanders by order of the court, which said order of the court is as follows:

UNITED STATES
vs.
THOMAS THOMPSON.

Ordered by the court that the marshal summons twenty-eight legal voters of the western district of Arkansas to be used as talesmen in the trial of the above-mentioned cause.

276 That all of said jurors so summoned by said marshal are residents of the city of Fort Smith, Arkansas, in this district. That a large number of the regular panel of jurors for the present term of this court are disqualified for the trial of this case, because of the fact that a jury was empanelled heretofore at the present term of this court in this cause, and a portion of the evidence heard, and not by reason of its notoriety throughout the district.

Wherefore, defendant prays the court for a jury from the body of the district for the trial of this cause."

Third. It was error in the court when this case was called for trial the second time to permit the clerk, over the objections of defendant, to call as jurymen for the trial of this cause the following-named persons, to wit: Wilson G. Gray, Wm. M. Perkins, and Isaac B. Sloan, and to accept them as qualified jurors, from which were to be selected the jury to try this cause, and to require defendant to peremptorily challenge said jurors or accept them for the trial of this cause. The said jurors were members of the regular panel of jurors for the present term of this court, and their names were on the list of jurors served upon defendant at the beginning of this term and before the first jury in this cause was empanelled, and they were presented to defendant when the first jury herein was empanelled, and were peremptorily challenged by him at that time. But the names of the aforesaid persons not being on the certified list of jurors served on this defendant on the 27th day of November, A. D. 1893, after the first jury empanelled had been discharged, which said list of jurors and certificate of clerk attached thereto, is as follows:

277] Name.	Post-office.	County.
1. William Nail	Ozone	Washington.
2. John Smith	Burton	Madison.
3. William J. Weaver	Ft. Smith	Sebastian.
4. John W. Yoes	Ft. Smith	Sebastian.
5. Adam Endres	Enterprise	Sebastian.
6. Ambrose Eubanks	Pauline	Franklin.
7. George W. Goodwin	Huntington	Sebastian.
8. William R. Gabbard	Aurora	Madison.
9. William C. Harrison	Vesta	Franklin.
10. Daniel Harrison	Fort Smith	Sebastian.
11. William F. Jones	Stanton	Washington.
12. William S. Lively	Vesta	Franklin.
13. John B. Morris	Goshen	Washington.
14. Salem W. Oliver	Potter	Polk.

Name.	Post-office.	County.
15. Robert Spoon	Van Buren	Crawford.
16. Henry Simpson	Ft. Smith	Sebastian.
17. Joseph Ritter	"	"
18. Henry Williams	"	"
19. Robert Walker	"	"
20. John D. Wilson	"	"
21. Jerry Washington	"	"
22. Frank Reed	"	"
23. William E. Henderson	"	"
24. James W. Rice	"	"
25. William S. Birnie	"	"
26. Hence Owens	"	"
27. John B. Wren	"	"
278 28 Granville Krenshaw	Fort Smith	Sebastian.
29. Berry Hogue	"	"
30. John A. Blackburn	"	"
31. Henry Dennis	"	"
32. Horace E. Gordon	"	"
33. William Patterson	"	"
34. John A. Miller	"	"
35. Robert T. Stegall	"	"
36. Edward C. Richart	"	"
37. John R. McBride	"	"
38. Elmo Caruthers	"	"
39. John Reutzel	"	"
40. Geo. L. Lewis	"	"
41. *H*eorge H. Lyman	"	"
42. George Maledon	"	"
43. Walter Evans	"	"
44. Chas. Ahrens	"	"
45. George W. Barnes	"	"

UNITED STATES OF AMERICA,
Western district of Arkansas:

L, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing annexed to this certificate is a true and correct list of jurors duly summoned and in attendance in the case of Thomas Thompson, the original of which is on file in my office.

In testimony whereof, I hereunto set my hand and affix the
279 seal of said court at Ft. Smith, Ark., in said district, this 27th day of November, 1893.

(Signed) S. WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

Fourth. It was error in the court, in empanelling the jury in this case the second time, to overrule defendant's challenge to twenty-eight jurors and to accept said jurors and require defendant to peremptorily challenge said jurors or accept them for the trial of this case.

Which said challenge is as follows:

UNITED STATES
vs. } Murder.
THOMAS THOMPSON.

Comes the defendant, Thomas Thompson, in person and by his attorneys, and comes the jury summoned in this cause, and the said defendant

challenges twenty-eight of said jurors for the reason that they are not of the regular panel of jurors for the present term of this court; that they are not from the body of the district, but are all residents of the city of Fort Smith, in said district; that they were not drawn from the box from which the names of jurors are usually drawn, but were summoned by the marshal of this district, from among the bystanders, by order of the court; that the names of the twenty-eight jurors so summoned by the marshal are on the certified copy of the list of jurors served upon defendant herein on the 27th day of November, 1893, from No. 18 to No. 45 of said list.

280 Wherefore, defendant prays that said panel of jurors be quashed as to the said twenty-eight names so as aforesaid summoned.

(Signed) THOMAS THOMPSON,
By BARNES & MELLETTE,
His Attorneys.

(See said list of jurors and certificate of clerk as set out in full in third assignment of error.)

Fifth. It was error in the court to say to witness Dr. G. W. Bell, when he was recalled for rebutting purposes by the prosecution:

"The COURT. How far did you say the body was from the plow?

"Answer. Right by the plow handles.

"The COURT. Right where a man would stand if he was hold of the handles."

And for the court to permit the district attorney to say to witness: "In the position a man would be in if he was holding the handles, or about that position? Answer. Yes, sir."

Sixth. It was error in the court to charge the jury that—

"The state of facts which I have stated to you is not such as would prevent you from trying defendant upon his plea of not guilty, and rendering a verdict upon the merits of the case," and in saying "that under the law the state of case it has named is not such an one as gives the defendant the right to claim that he has been in such jeopardy, formerly, as to prevent you from passing upon the merits of this case and to determine his guilt or innocence from the law and the evidence in the case." (Trans., p. .)

281 Seventh. It was error in the court to say to the jury that the plea of former jeopardy was not well taken, and that under the facts as stated by the court the defendant had not been in former jeopardy; and in further saying: "Then I can state to you that upon the facts as I have enumerated them, your duty will be to find the issue raised by the special plea of former jeopardy for the Government in this case, and when you have made your finding upon that, you will then proceed to consider the charge of murder upon the merits of the case." (Trans., p. .)

Eighth. It was error in the court to deliver its charge to the jury orally, and have it taken by the court stenographer.

Ninth. The court erred in that part of the charge which defines the word "willfully" as used in the indictment. (Trans., p. .)

Tenth. The court erred in defining the word "intentionally" or as to how the jury should find the intent of the party charged.

Eleventh. The court erred in giving the law as to malice aforethought—what it is—how it is to be proven or established, and how applied to the facts in this case, and giving different definitions of the term "malice aforethought," because it had a tendency to confuse the minds of the jury. And in saying to the jury:

"Now, the law expresses its meaning of this phrase in several different ways. It says in one definition that it is the doing of a wrongful act without just cause in such a way and under such circumstances as to
282 show that it was done wrongfully, and that it was done in the absence of that which would give a right to the party to defend against it, or that it was done in the absence of mitigating circumstances." (Trans., p. .)

"Again, the law gives another definition. It says it is the doing of a wrongful act, without just cause or excuse, and in the absence of mitigating facts, and when it is done that way it shows that he who did it had a heart void of social duty and a mind fatally bent on mischief. (Trans., p. .)

"Again, the law defines this characteristic of the crime of murder, and it tells us how to find it when it says, 'it can only be found by circumstance, because malice aforethought, like willfully, is something which exists in the mind, that is necessary to be found to make up the elements of the case; and, as you can not get into the mind to know what is going on there, and as you could not tell what is transpiring there if you could get into it, you must learn it in some other way, and there must be some rational way in which you must learn it; some way which rational men would adopt, because we are not authorized to adopt any other method than that which is reasonable in arriving at conclusions, and there is a reasonable way at which men may arrive at conclusions." (Trans., p. .)

"Again, the law says that malice is evidenced by the existence of a wicked, depraved, and malignant heart, a purpose to do a willful act. It may be either express or implied in the law. Express malice is
283 where one with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention as lying in wait, antecedent menaces, former grudges, concerted schemes to do another some bodily harm. So, in many cases, where no malice is expressed, the law will imply it, as when a man willfully poisons another; in such a deliberate act the law will presume malice. And if a man kills another suddenly, without any or without considerable provocation, the law implies malice, for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause." (Trans., p. .)

"Again, the law says that malice is an intention to do bodily harm. If a man by his acts, such as shooting at another, manifests an intention to do bodily harm and that intention as manifested takes away the life of another, if there is nothing in that case which gives him the right to do that bodily harm, under the law, or no condition surrounds him that mitigates that crime by the rules of the law, the very intention that surrounds him makes malice aforethought; that is, in the absence of these other two conditions. It means a formed design to do mischief. It has also been defined as a deliberate intent to kill." (Trans., p. .)

"Malice is an intent of the man's heart, the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act, or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, or in the absence of mitigating circumstances which produces death, it is murder." (Trans., p. .)

284 "Malice is an intent of the mind and heart. There is never presented to the jury direct evidence of what was the intent of the man's heart at the time. You can not tell the condition of the mind by direct proof, bearing in mind the distinction between these two kinds of evidence, positive or direct proof, and circumstantial evidence. Positive or direct proof is the proof which shows the existence of the very thing itself that you were hunting for." (Trans., p. .)

Twelfth. The court erred in its charge to the jury in stating what the law presumes malice from the use of a deadly weapon; that if its use was not authorized by law it is presumed to have been used in malice, and if self-defense and manslaughter are eliminated then malice is to be presumed. And in further saying:

"Therefore, we have a right to say, and the law says, that where a homicide is committed by weapons indicating a design, then it is not necessary to prove that such design existed for any definite period before the fatal blow. From the very fact of a blow being struck, we have a right to infer, as a presumption of fact, that the blow was intended prior to the striking, although at a period inappreciately distant. We frequently find the statement laid down in reported cases and by text writers that malice is to be inferred from the use of a deadly weapon. This court always modifies that, and I call your especial attention to the modification. Malice is to be inferred from the use of a deadly weapon if the evidence shows

285 that the use of it in a deadly way was not authorized by the law of self-defense, or the evidence shows that it was not an act that because of the conduct of the party killed, at the time of the killing, that was mitigated, under the law—if these two conditions are eliminated from the case by the evidence showing the use of a weapon, and the willful use of a deadly weapon, if these conditions are eliminated, it shows the existence of malice aforethought." (Trans., p. .)

Thirteenth. The court, in giving the law of self-defense, in stating the effect of a man arming himself and going to place of difficulty, and in reading from a case purporting to give the law governing a state of case where accused goes to place of difficulty with a deadly weapon, because the law and facts in said case read are not applicable; and in saying:

"The law says we may deprive ourselves of that right by our own wrongful conduct, and, that we may make no mistake, let us go to the law to see under what circumstances a man may deprive himself of the right, and in order that you may have an exact illustration I read to you a short case—that of Vaiden vs. Commonwealth, 12th Pratt., 717: 'The deceased and Vaiden were at the latter's house one evening drinking and playing cards together. Some high words passed between them, growing out of the deceased charging Vaiden with cheating. Vaiden's wife told the deceased that he had promised to make no 'fuss,' to which he assented, and said good night and left the house. He did not go away, however, for he was heard in the yard swearing very loudly and apparently much enraged. Hearing him, Vaiden took up his gun and started for the

door, but was induced by his wife not to go out. Guns were
286 evidently used instead of walking sticks in that neighborhood, for just then the deceased called through the window that he wanted his gun, and the weapon was handed to him through the door by Mrs. Vaiden. The deceased then walked away, accompanied by two other persons and by a son of Vaiden's, who went with the party as far as the fence to let them through the draw-bars. As they stood at the fence talking, Mr. Vaiden appeared with his gun, seeing which the deceased jumped over the fence, took hold of the gun by the barrel, as if to use it as a club, and rushed at Vaiden. The latter called out that if he did not stop he would shoot him. The warning went unheeded, and when the deceased got within a few feet of him Vaiden, falling back a few steps, fired. The deceased then struck Vaiden two blows with the breech of his gun, and staggered back, mortally wounded, dying a few hours afterwards. Vaiden, indicted for the killing, set up the plea of self-defense; but the court held that he, being responsible for the altercation in following the deceased with his gun after he had departed from the house, could not avail himself of that plea, and he was convicted." (Trans., p. .)

Fourteenth. The court erred in stating to the jury the effect of the defendant arming himself with a gun and going back to the place of the killing, in failing to state that defendant had a right to arm himself if he believed his life was in danger, and that his going back by the field, if it was on his reasonable way home, having the gun merely to protect himself in case of an attack, he would not be cut off from the right of self-defense. And in saying:

"The law of self-defense gives him the right to arm himself
287 for the purpose of defending himself as long as he is in the right. But if he has a conception that deadly danger may come upon him, but he is away from it so he can avoid it, his duty is to stay away from it, and avoid it, because he has no right to go to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty, or with the intent of having an affray." (Trans. p. .)

Fifteenth. The court erred in giving the law as to previous threats and the law governing threats, and in saying:

"But if threats are made, and there is an absence from the case of that which indicates a deadly design, or design to do great bodily harm, really or apparently, the condition that I have given you where you can use them as evidence, you can only use them and consider them for the purpose of showing the existence of special spite or ill will or anomosity upon the part of the defendant." (Trans. p. .)

Sixteenth. It was error in the court to read from the authorities cited in a dissenting opinion of Justice Clifford of the Supreme Court of the United States in the case of Wiggins vs. The People. (Trans. p .)

Seventeenth. The court erred in giving the law as to the proof of motive in this case, and in stating that there is no adequate motive for the committing of a deliberate murder, and in saying:

288 "So, also, for the smallest plunders, murders have been deliberately executed. We have an illustration of this in the trial of Muller in England in 1873 for the murder of Briggs. Briggs's watch was seen by Muller in a railway car. Briggs was asleep. The watch was exposed, and Muller killed Briggs by a sudden attack and succeeded

in making his escape. He was afterwards arrested and convicted on circumstantial evidence, and before execution confessed the crime. Until the confession the justice of the conviction was largely criticised, on the ground that the stealing of the watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great." (Trans. p. .)

Eighteenth. The court erred in giving the law of manslaughter and in saying:

"For the law says that the previous selection, preparation, and subsequent use of a deadly weapon shows that there was a purpose to kill contemplated before the affray existing, and whenever that exists, when it is done unlawfully and improperly, so that there is no law of self-defense in it, the fact that they have been in an actual affray with hands or fists would not reduce the grade of the crime to manslaughter" (Trans. p. .)

"It can not grow out of a state of case where there is a killing because of threats previously made, because of that which evidences special spite or grudge or ill will, for if the killing is done on that ground, and if it is shown by the threats and the previous preparation of the defendant, or the fact of his arming himself and going back to the field where
289 they were at work, and while there shot Charles Hermes to death, it can not be evidence of that condition which could reduce the crime to manslaughter." (Trans. p. .)

And in not stating the law governing the state of facts set forth by defendant in his testimony, wherein defendant said in substance that he thought that possibly the deceased and his father and brother might offer him violence, and he armed himself for protection in case that they did so, and that his only practicable road home was the road which ran by the field where killing occurred, and that he did not go that route for the purpose of having a difficulty.

And because the court gave numerous illustrations in giving the law of manslaughter, showing what would not reduce the killing to that grade of crime, and did not in like manner illustrate what state of facts would make a case of manslaughter.

Nineteenth. The court erred in giving the law of manslaughter in stating that if defendant prepared himself and went to place of killing he would be guilty of murder and not manslaughter, and in not giving the law governing the case where a man or person charged arms himself simply for the purpose of protection and in good faith goes to or by place of killing.

Twentieth. The court erred in charging the jury as to the age of defendant, and in expression "that you are not to be swayed from your purpose by any false sympathy;" and in saying:

"The proof in this case from the declarations of the defendant is that he is 17 years old. The law holds a person of that age accountable for the
290 crime of murder. The law says that every citizen is to be protected from acts of violence which destroy life, and it does not make any difference whether the person committing those actos of violence is seventeen years of age or seventy; they stand upon the same plane in that particular, and you are to determine this case upon this law and upon the evidence offered. You are neither to be swayed to the right or to the left by any false sympathy or any misconception of it." (Trans. p. .)

Twenty-first. The charge of the court was error, because it was prolix, confusing, abstract, argumentative, and misleading.

Twenty-second. It was error in the court to overrule defendant's motion for a new trial and to enter judgment against him and sentence him to death.

(Signed) BARNES & MELLETTE,
Attorneys for the defendant.

(Endorsed on the back thereof:) United States vs. Thomas Thompson. Murder. Assignment of Errors. Filed January 16th, 1894. (Signed) Stephen Wheeler, clerk.

291 *Petition to clerk for writ of error.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
THOMAS THOMPSON. } Murder.

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner respectfully represents that at the November term, A. D. 1893, of this court, he was convicted on an indictment charging him with the crime of murder, and that the said court has pronounced judgment and sentence on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial in said cause there is great and manifest error, to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the *sale* of said circuit in said cause, removing the said cause and the record therein to the said Supreme Court in order that the same may be there re-examined, and if error be found that the judgment and sentence against him therein may be reversed.

(Signed) THOMAS THOMPSON,
by BARNES & MELLETTE,
His attorneys.

292 *Petition to prosecute as a pauper.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs.
THOMAS THOMPSON. } Murder.

I, Thomas Thompson, the defendant in the above-entitled cause, do solemnly swear that I am not possessed of sufficient means, and unable

to procure the same, as to prosecute the writ of error taken in the said cause in the Supreme Court of the United States, and am not worth ten dollars a'ove my wearing apparel.

I therefore pray that said appeal be prosecuted in forma pauperis.

His
(Signed.) THOMAS x THOMPSON.
mark.

Sworn to and subscribed before me this 15th day of January, 1894.

(Signed.) STEPHEN WHEELER, Clerk.

I hereby certify that the facts set forth in the above affidavit are true. This July 16th, 1894.

(Signed.) I. C. PARKER,
U. S. District Judge.

Endorsed as filed Jan. 16th, 1894. (Signed.) Stephen Wheeler, clerk.

293 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the western dist. of Ark., greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the United States, plaintiff, and Thomas Thompson, d'f't, a manifest error hath happened, to the great damage of the said Thomas Thompson, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 60 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done there in to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 31st day of January, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL.] STEPHEN WHEELER,
Clerk of the Circuit Court of the United States for the Western District of Arkansas.

Allowed by

Justice of the Supreme Court of the United States.

294 UNITED STATES OF AMERICA, ss:

To Jas. F. Read, esq., U. S. district attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit

court of the United States for the western district of Arkansas, wherein Thomas Thompson, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable I. C. Parker, judge of the district court of the United States, this 31st day of January, in the year of our Lord one thousand eight hundred and ninety-four.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

I, Jas. F. Read, U. S. dist. att'y for the western dist. of Ark., hereby accept service of the within citation, at Ft. Smith, Ark., this 31st day of January, 1894.

JAS. F. READ,
U. S. Dist. Atty. for W. D. A.

295 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the Western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record in the case of U. S. vs. Thomas Thompson, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 2 day of Feb'y, A. D. 1894.

[SEAL.] S. WHEELER, *Clerk.*
By I. W. DODGE, D. C.

296 (Indorsement on cover:) Case No. 15502, term No. 1118, W. Arkansas, C. C. U. S. Thomas Thompson, plaintiff in error vs. the United States. Filed February 8, 1894.

Office Supreme Court, U. S.
FILED.
OCT 6 1894
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES

Case No. 15,502. Term No. ~~1118.~~ 637

THOMAS THOMPSON, PLAINTIFF IN ERROR,

VERSUS

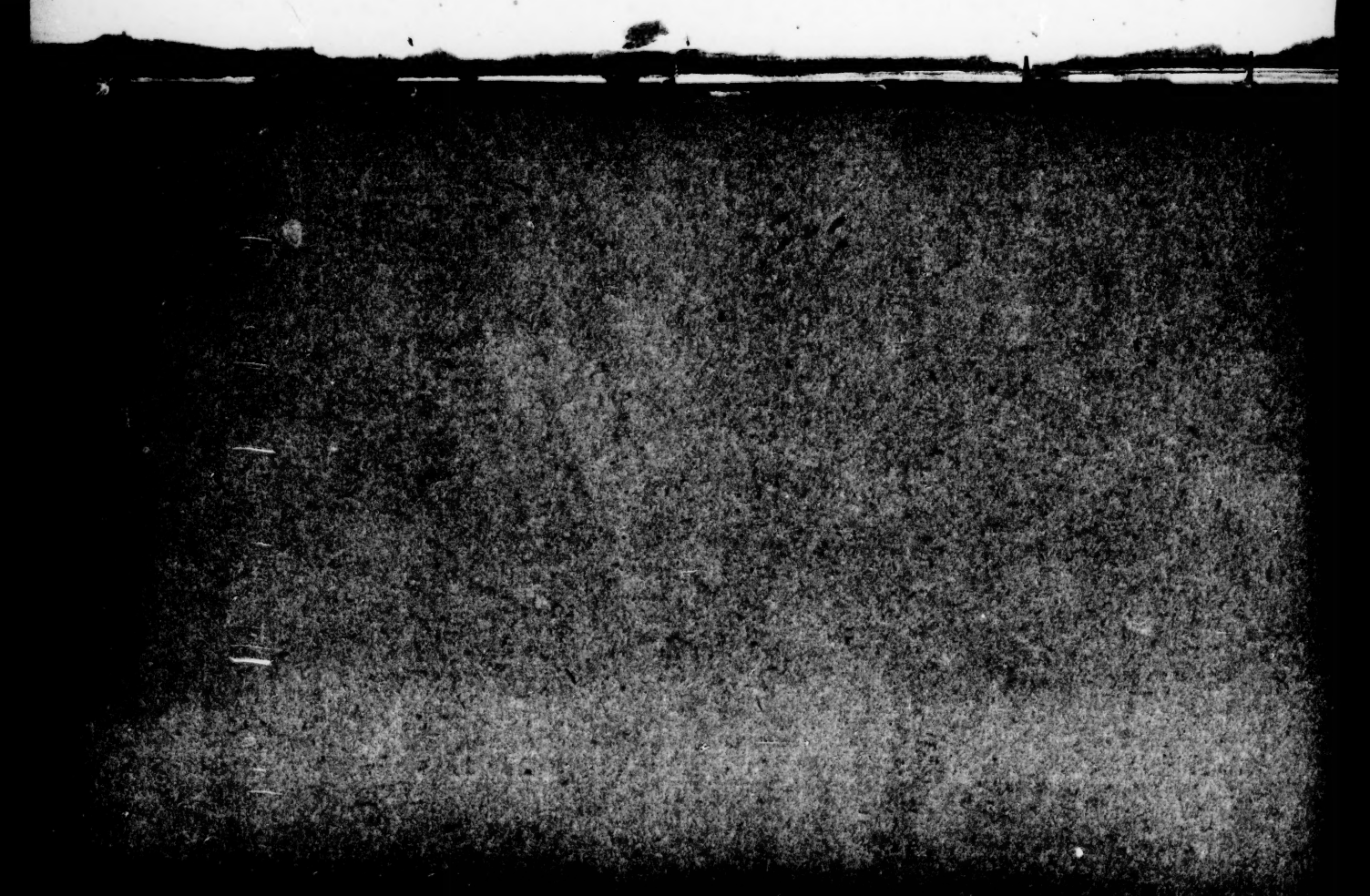
THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

A. H. GARLAND,

Attorney for Plaintiff in Error.

J. H. Mayers & Co., Printers, Fort Smith, Ark.



IN THE SUPREME COURT OF THE UNITED STATES

Case No. 15,502. Term No. 1118.

THOMAS THOMPSON, PLAINTIFF IN ERROR,

VERSUS

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

ABSTRACT.

The killing of Charles Hermes, which it is alleged, was done by the defendant Thomas Thompson under such circumstances as to constitute the crime of murder, occurred in the Creek Nation, Indian Territory, on the 8th day of June, 1893.

The deceased was living with his father, Jacob Hermes, who had rented land at the place of the killing, and was making a crop. He was a white man, and was, at the time of his death, about twenty-one years old. The defendant is a full blood Indian boy, seventeen years old—born and raised in the Creek Nation, unable to speak any language but his own, and as the proof showed unable to understand the English language.

The deceased and his father had rented land from Sam Haynes, a Creek Indian, who lived near Okmulgee in the Creek Nation. The defendant lived with Sam Haynes, and the house where deceased lived, and the field which he, his father and brother cultivated was about a half mile from Sam Haynes'.

Old man Hermes and his boys had for some reason shown considerable ill-feeling toward this Indian boy, and they had gone so far as to threaten to injure him if he ever came about where they were (see Jacob Hermes' testimony, page 47 printed record, but more fully the testimony of Sam Haynes and Sam Checotah, pages 85-6 and 89 printed record). Jacob Hermes claimed that the boy had been abusing and killing his hogs, and for that reason he had said he would hurt him, but the testimony of Haynes and Checotah indicates that the old man simply disliked the boy, and he told said witnesses that if he "come acting the monkey around him any more, he would chop his head open." Haynes testified that he told the defendant what old man Hermes had said, and directed him to stay away from there.

The testimony showed that Thomas Thompson, defendant, was a harmless Indian boy up to the time of the killing. He testified that he thought he was about sixteen years of age, although it was generally conceded that he was seventeen. On the forenoon of the day of the killing he had been at home with Mrs. Haynes and her little girl. According to the testimony of Mrs. Haynes (see page 63 of the printed record), the three had gone out picking berries before dinner, getting back about 12 o'clock, and after dinner the boy was hoeing in the garden, when Mrs. Haynes called him to take some sewing over to Mrs. Checotah's, who lived two or three miles away. The boy caught a horse, got on it without any saddle, took the bundle Mrs. Haynes gave him and started off on his errand. Mrs. Haynes says he had no arms of any kind when he left her house and that he appeared in a good humor with everybody at that time. His road to Mrs. Checotah's ran by the field where the deceased, his father and brother were working. There was absolutely nothing at any time to indicate that in less than two hours this Indian boy would have taken the life of Charles Hermes. He had never had any ill-feeling against any of the Hermes family up to the time he left the house upon the errand for Mrs. Haynes.

As the Hermes—father and two sons—approached their field to go to work after dinner, the defendant was off his horse a short distance from the gate, according to the testimony of Jacob and George Hermes, and they thought he was picking black-berries. They went in the field and the defendant

road along the road on the outside, carrying his bundle, but with no arms. The witnesses, Jacob and George Hermes, admit that he had no arms at that time, and that he rode along the fence near them for more than a quarter of a mile. They deny that there was any quarrel or trouble or talking between them and defendant as he was thus riding along by them.

The only reasonable solution of the killing, however, points to the theory adopted by the defense, that there was a difficulty between the boy and the deceased and his father and brother as they were passing down the fence together, and that the trouble was of such a nature as to cause the boy to arm himself before he came back by the field on his road home, which the testimony shows that he did.

The defendant, in his testimony, given through an interpreter (page 90 printed record), said that he had never had any trouble with the deceased or his father; that Sam Haynes and Sam Checotah had told him that the old man had threatened to kill him if he didn't quit acting the monkey around them; that the only thing he ever did was to laugh at the old man one day when he was whipping his horse. He says that on the day of the killing as he was riding along the field when they were going to their work, the old man and the deceased began quarrelling with him. He could see that they were mad at him, but could not understand much that was said to him, although he could tell that they were talking about hogs. He says he remembered the threats against him they had made to Haynes and Checotah, and he thought at the time

they were going to hurt him. That the old man came to the fence and shook his fist at him. In support of the theory that they had a difficulty, as defendant testifies, see the testimony of William Baxter and James Gregory (pages 78 and 81 printed record). These witnesses state that they were down in the field where the deceased lay after he was killed, before the body was removed. That then and there old man Hermes told them that when the defendant passed the field going to Checotah's, he and his boys had a difficulty. That the latter stopped the defendant, accused him of stealing hogs, and said they would whip him; that the defendant rode off and came back by the fence and stopped and said something and the deceased said something, dropped his lines and started toward the boy and the latter shot him. The defendant says that after he left the field going on his road to Mrs. Checotah's, he got to thinking about what Sam Haynes had told him as to the threats old man Hermes had made, and as there was no other road for him to return home, except by the field, he thought it was best for him to arm himself so that he could make a defense in case he was attacked. He testified that he did not arm himself with the expectation of having a difficulty, or for the purpose of bringing one on, but simply to protect himself in case he was attacked. After he had delivered the bundle to Mrs. Checotah's, he went by Amos Gray's house. The latter was not at home, but seeing his Winchester in the rack over the door, he took it for the purposes mentioned. The defendant testified that after he got the gun he came on

back by the field, and as he got opposite where they were ploughing, the boys were nearly out to the end of the rows, and the old man was behind; that the boys commenced on him again and said something about a gun, and one of them started towards the fence, and he looked and saw a gun setting in the corner of the fence, and that then he knew they intended to kill him, and he threw down his gun and fired at the one who had started toward the fence, and then ran away on his horse, and that old man Hermes jumped on a horse and followed him and shot at him several times. Defendant testified that the horse deceased was plowing had not arrived at the end of the row at the time he shot, but that deceased had left the plow and came on past the horse before he was shot. This theory is sustained by the testimony of William Baxter and James Gregory as to what old man Hermes told them after the killing about his boy having started toward the defendant when the latter fired.

The defense contended that the deceased left his plow before he had gotten to the end of the row and came on to defendant, and that if his body was lying close to the plow it was caused by the horse having moved up after the shooting and started to make the turn. The contention of the government was that deceased had gotten to the end and was turning and that he was shot while the lines were around him, and that he fell near the handles of the plow. Old man Hermes, in his testimony (printed record page 51), says, that the deceased was at the end ready to turn but had not begun to turn at the

time of the shooting. The plow would have been standing north and south under these circumstances, as the rows of corn ran that way, or at least they were plowing that way. George Hermes, in his testimony (printed record page 58), says, that he had not begun turning at the time he was shot, and that he was plowing from north to south.

Dr. George W. Bell, in his testimony (page 60 printed record), says, that he saw the body lying as it had fallen in the field, and that the body was near the plow and that the plow was pointed east. This, we contend, goes to establish the theory of the defense that the deceased passed on by the horse going towards defendant when he was shot, and that the horse came up to where the body was after the shot was fired, and started to turn, which brought the plow near body of deceased.

ASSIGNMENT OF ERRORS.

The defendant in the above entitled cause, Thomas Thompson, files this assignment of errors committed on the trial of the above cause, to-wit:

First. It was error in the court to discharge the jury empanelled for the trial of this cause on November 23rd, 1893, before said jury had arrived at a verdict, after said jury had been duly sworn; the witnesses for the defense and prosecution had been sworn and put under the rule; the statements of the case made by the counsel for the government and defendant, respectively, and one witness examined in chief by the Gov-

ernment. For the reason that James A. Johnson, a member of said jury, had been a member of the grand jury that returned the indictment herein into court. The said juror, James A. Johnson, having answered all necessary questions upon his *voire dire*, except as to whether he had been a member of said grand jury or not, qualifying him to sit as a juror in this cause, and was not asked after the discovery of the fact that he had been a member of said jury as to whether he had heard the evidence before the said grand jury, or had formed or expressed an opinion in the case.

Second. It was error in the court, after the discharge of the jury first empanelled for the trial of this cause in overruling the defendant's motion for a jury from the body of the district for the trial of this cause, which said motion is as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF ARKANSAS.

UNITED STATES
vs.
THOMAS THOMPSON. } Murder.

"Comes the defendant, Thomas Thompson, and states that of the list of jurors served upon him from which are to be selected the jury to try this case, but seventeen are of the regular panel of jurors for the present term of this court regularly drawn from a box as provided, to-wit: From No. 1 to and including No. 17 on the said list, as aforesaid, served upon defendant, which said list is hereto attached and made a part of this motion. And that the remaining twenty-eight (28) names

on said list from No. 18 to and including No. 45, the last name on said list, were summoned by the marshal of this district from the by standers by order of the court, which said order of the court is as follows:

UNITED STATES
vs.
THOMAS THOMPSON.

"Ordered by the court that the marshal summons twenty-eight legal voters of the western district of Arkansas to be used as talesmen in the trial of the above mentioned cause."

That all of said jurors so summoned by said marshal are residents of the City of Fort Smith, Arkansas, in this district. That a large number of the regular panel of jurors for the present term of this court are disqualified for the trial of this cause, because of the fact that a jury was empanelled heretofore at the present term of this court in this cause, and a portion of the evidence heard, and not by reason of its notoriety throughout the district.

Wherefore, defendant prays the court for a jury from the body of the district for the trial of this cause."

Third. It was error in the court when this case was called for trial the second time to permit the clerk, over the objections of defendant, to call as jurymen for the trial of this cause the following named persons, to-wit:

Wilson G. Gray, Wm. M. Perkins, and Isaac B Sloan, and to accept them as qualified jurors, from which were to be selected the jury to try this cause, and to require defendant to

peremptorily challenge said jurors or accept them for the trial of this cause. The said jurors were members of the regular panel of jurors for the present term of this court, and their names were upon the list of jurors served upon defendant at the beginning of this term aud before the first jury in this cause was empanelled, and they were presented to defendant when the first jury herein was empanelled, and were peremptorily challenged by him at that time. But the names of the aforesaid persons not being on the certified list of jurors served on this defendant on the 27th day of November, A D. 1893, after the first jury empanelled had been discharged, which said list of jurors and certificate of clerk attached thereto, is as follows:

	NAME	POST-OFFICE	COUNTY
1	William Nail	Ozone	Washington.
2	John Smith	Burton	Madison.
3	William J. Weaver	Fort Smith	Sebastian.
4	John W. Yoes	Fort Smith	Sebastian.
5	Adam Endres	Enterprise	Sebastian.
6	Ambrose Eubanks	Pauline	Franklin.
7	George W. Goodwin	Huntington	Sebastian.
8	Wm. R. Gabbard	Aurora	Madison.
9	Wm. C. Harrison	Vesta	Franklin.
10	Daniel Harrison	Fort Smith	Sebastian.
11	Wm. F. Jones	Stanton	Washington.
12	Wm. S. Lively	Vesta	Franklin.
13	John B. Morris	Goshen	Washington.
14	Salem W. Oliver	Potter	Polk.
15	Robert Spoon	Van Buren	Crawford.
16	Henry Simpson	Fort Smith	Sebastian.
17	Joseph Ritter	"	"
18	Henry Williams	"	"
19	Robert Walker	"	"
20	John D. Wilson	"	"
21	Jerry Washington	"	"
22	Frank Reed	"	"
23	Wm. E. Henderson	"	"
24	James W. Rice	"	"
25	Wm. S. Birnie	"	"
26	Hence Owens	"	"
27	John B. Wren	"	"
28	Granville Krenshaw	"	"
29	Berry Hogue	"	"
30	John A. Blackburn	"	"
31	Henry Dennis	"	"
32	Horace E. Gordon	"	"
33	Wm. Patterson	"	"
34	John A. Miller	"	"
35	Robert T. Stegall	"	"
36	Edward C. Richart	"	"
37	John R. McBride	"	"
38	Elmo Caruthers	"	"
39	John Reutzel	"	"
40	Geo. L. Lewis	"	"
41	George H. Lyman	"	"
42	George Maledon	"	"
43	Walter Evans	"	"
44	Chas. Ahrens	"	"
45	George W. Barnes	"	"

UNITED STATES OF AMERICA, }
Western district of Ark. }

I, Stephen Wheeler, clerk of the District Court of the United States for the Western District of Arkansas, in the

eighth circuit, do hereby certify that the foregoing annexed to this certificate is a true and correct list of jurors duly summoned and in attendance in the case of Thomas Thompson, the original of which is on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court at Fort Smith, Ark., in said district, this 27th day of November, 1893.

(Signed) S. WHEELER, Clerk,
By I. M. DODGE, D. C.

Fourth. It was error in the court, in empanelling the jury in this case the second time, to overrule defendant's challenge to twenty-eight jurors and to accept said jurors and require defendant to peremptorily challenge said jurors or accept them for the trial of this case.

Which said challenge is as follows:

UNITED STATES
vs.
THOMAS THOMPSON. } Murder.

Comes the defendant, Thomas Thompson, in person and by his attorneys, and comes the jury summoned in this cause, and the said defendant challenges twenty-eight of said jurors for the reason that they are not of the regular panel of jurors for the present term of this court; that they are not from the body of the district, but are all residents of the city of Fort Smith, in said district; that they were not drawn from the box from which the names of jurors are usually drawn, but were summoned by the marshal of this district, from among the by-

standers, by order of the court; that the names of the twenty-eight jurors so summoned by the marshal are on the certified copy of the list of jurors served upon defendant herein on the 27th day of November, 1893, from No. 18 to No. 45 of said list.

Wherefore, defendant prays that said panel of jurors be quashed as to the said twenty-eight names so as aforesaid summoned.

(Signed) THOMAS THOMPSON,
By BARNES & MELLETTE,
His Attorneys.

(See said list of jurors and certificate of clerk as set out in full in third assignment of errors.)

Fifth It was error in the court to say to witness Dr. G. W. Bell, when he was recalled for rebutting purposes by the prosecution:

"The Court: How far did you say the body was from the plow?

"Answer: Right by the plow handles.

"The Court: Right where a man would stand if he was hold of the handles."

And for the court to permit the district attorney to say to witness: "In the position a man would be if he was holding the handles, or about that position? Answer: Yes, sir."

Sixth. It was error in the court to charge the jury that—

"The state of facts which I have stated to you is not such as would prevent you from trying defendant upon his plea of

not guilty, and rendering a verdict on the merits of the case,' and in saying "that under the law, the state of the case it has named is not such an one as gives the defendant the right to claim that he has been in such jeopardy, formerly, as to prevent you from passing upon the merits of this case and to determine his guilt or innocence from the law and the evidence in the case." (Tr. p. .)

Seventh. It was error in the court to say to the jury that the plea of former jeopardy was not well taken, and that under the facts as stated by the court the defendant had not been in former jeopardy; and in further saying: "Then I can state to you that upon the facts as I have enumerated them, your duty will be to find the issue raised by the special plea of former jeopardy for the government in this case, and when you have made your finding upon that, you will then proceed to consider the charge of murder upon the merits of the case." (Tr. p. .)

Eighth. It was error in the court to deliver its charge to the jury orally, and have it taken by the court stenographer.

Ninth. The court erred in that part of the charge which defines the word "willfully" as used in the indictment. (Tr. p. .)

Tenth. The court erred in defining the word "intentionally" or as to how the jury should find the intent of the party charged.

Eleventh. The court erred in giving the law as to malice aforethought—what it is—how it is to be proven or estab-

lished, and how applied to the facts in this case, and giving different definitions of the term "malice aforethought," because it had a tendency to confuse the minds of the jury. And in saying to the jury:

"Now, the law expresses its meaning of this phrase in several different ways. It says in one definition that it is the doing of a wrongful act without just cause in such a way and under such circumstances as to show that it was done wrongfully, and that it was done in the absence of that which would give a right to the party to defend against it, or that it was done in the absence of mitigating circumstances." (Tr. p. .)

"Again, the law gives another definition. It says it is the doing of a wrongful act, without just cause or excuse, and in the absence of mitigating facts, and when it is done that way it shows that he who did it had a heart void of social duty and a mind fatally bent on mischief." (Tr. p. .)

"Again, the law defines this characteristic of the crime of murder, and it tells us how to find it when it says, 'it can only be found by circumstance, because malice aforethought, like willfully, is something which exists in the mind, that is necessary to be found to make up the elements of the case; and, as you can not get into the mind to know what is going on there, and as you could not tell what is transpiring there if you could get into it, you must learn it in some other way, and there must be some rational way in which you must learn it; some way which rational men would adopt, because we are not authorized to adopt any other method than that which is reason-

able in arriving at conclusions; and there is a reasonable way at which men may arrive at conclusions." (Tr. p. .)

"Again, the law says that malice is evidenced by the existence of a wicked, depraved, and malignant heart, a purpose to do a willful act. It may be either express or implied in the law. Express malice is where one with a sedate, deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention, as lying in wait, antecedent menaces, former grudges, concerted schemes to do another some bodily harm. So, in many cases, where no malice is expressed, the law will imply it, as when a man willfully poisons another; in such a deliberate act the law will presume malice. And if a man kills another suddenly, without any or without considerable provocation, the law implies malice, for no person, except of abandoned heart, would be guilty of such an act upon a slight or upon no apparent cause." (Tr. p. .)

"Again, the law says that malice is an intention to do bodily harm. If a man by his acts, such as shooting at another, manifests an intention to do bodily harm and that intention as manifested takes away the life of another, if there is nothing in that case which gives him the right to do that bodily harm, under the law, or no condition surrounds him that mitigates that crime by the rules of the law, the very intention that surrounds him makes malice aforethought; that is, in the absence of these two conditions. It means a formed design to do mischief. It has also been defined a deliberate intent to kill." (Tr. p. .)

"Malice is an intent of the man's heart, the doing of a wrongful act without just cause or excuse, or in the absence of that which justifies the act, or which reduces the grade of the crime. Whenever a wrongful act is done without just cause or excuse, or in the absence of mitigating circumstances which produces death, it is murder." (Tr. p. .)

"Malice is an intent of the mind and heart. There is never presented to the jury direct evidence of what was the intent of the man's heart at the time. You can not tell the condition of the mind by direct proof, bearing in mind the distinction between these two kinds of evidence, positive or direct proof, and circumstantial evidence. Positive or direct proof is the proof which shows the existence of the very thing itself that you were hunting for." (Tr. p. .)

Twelfth. The court erred in its charge to the jury in stating what the law presumes malice from the use of a deadly weapon; that if its use was not authorized by law it is presumed to have been used in malice, and if self-defense and manslaughter are eliminated then malice is to be presumed. And in further saying:

"Therefore, we have a right to say, and the law says, that where a homicide is committed by weapons indicating a design, then it is not necessary to prove that such design existed for any definate period before the fatal blow. From the very fact of a blow being struck, we have a right to infer, as a presumption of fact, that the blow was intended prior to the striking, although at a period inappreciately distant. We frequently

find the statement laid down in reported cases and by text writers that malice is to be inferred from the use of a deadly weapon. This court always modifies that, and I call your especial attention to the modification. Malice is to be inferred from the use of a deadly weapon if the evidence shows that the use of it in a deadly way was not authorized by the law of self-defense, or the evidence shows that it was not an act that because of the conduct of the party killed, at the time of the killing, that was mitigated, under the law—if these two conditions are eliminated from the case by the evidence showing the use of a weapon, and the willful use of a deadly weapon, if these conditions are eliminated, it shows the existance of malice aforethought." (Tr. p. .)

Thirteenth. The court, in giving the law of self-defense, in stating the effect of a man arming himself and going to a place of difficulty, and in reading from a case purporting to give the law governing a state of case where accused goes to place of difficulty with a deadly weapon, because the law and facts in said case read are not applicable; and in saying:

"The law says we may deprive ourselves of that right by our own wrongful conduct, and, that we may make no mistake, let us go to the law to see under what circumstances a man may deprive himself of the right, and in order that you may have an exact illustration I read to you a short case—that of *Vaiden vs Commonwealth, 12th Pratt.,717:* 'The deceased and Vaiden were at the latter's house one evening drinking and playing cards together. Some high words passed between them,

growing out of the deceased charging Vaiden with cheating. Vaiden's wife told the deceased that he had promised to make no 'fuss,' to which he assented, and said good night and left the house. He did not go away, however, for he was heard in the yard swearing very loudly and apparently much enraged. Hearing him, Vaiden took up his gun and started for the door, but was induced by his wife not to go out. Guns were evidently used instead of walking sticks in that neighorhood, for just then the deceased called through the window that he wanted his gun, and the weapon was handed to him through the door by Mrs. Vaiden. The deceased then walked away, accompanied by two other persons and by a son of Vaiden's, who went with the party as far as the fence to let them through the drawbars. As they stood at the fence talking, Mr. Vaiden appeared with his gun, seeing which the deceased jumped over the fence, took hold of the gun by the barrel, as if to use it as a club, and rushed at Vaiden. The latter called out that if he did not stop he would shoot him. The warning went unheeded, and when the deceased got within a few feet of him Vaiden, falling back a few steps, fired. The deceased then struck Vaiden two blows with the breech of his gun, and staggered back, mortally wounded, dying a few hours afterwards. Vaiden, indicted for the killing, set up the plea of self-defense; but the court held that he, being responsible for the altercation in following the deceased with his gun after he had departed from the house, could not avail himself of that plea, and he was convicted." Tr. p. .)

Fourteenth. The court erred in stating to the jury the effect of the defendant arming himself with a gun and going back to the place of the killing, in failing to state that defendand had a right to arm himself if he believed his life was in danger, and that his going back by the field, if it was on his reasonable way home, having the gun merely to protect himself in case of an attack, he would not be cut off from the right of self-defense. And in saying:

"The law of self-defense gives him the right to arm himself for the purpose of defending himself as long as he is in the right. But if he has a conception that deadly danger may come upon him, but he is away from it so he can avoid it, his duty is to stay away from it, and avoid it, because he has no right to go to the place where the slain person is with a deadly weapon for the purpose of provoking a difficulty, or with the intent of having an affray." (Tr. p. .)

Fifteenth The court erred in giving the law as to previous threats and the law governing threats, and in saying:

"But if threats are made, and there is absence from the case of that which indicates a deadly design, or design to do great bodily harm, really or apparently, the condition that I have given you where you can use them as evidence, you can only use them and consider them for the purpose of showing the existence of special spite or ill will or animosity upon the part of the defendant." (Tr p. .)

Sixteenth. It was error in the court to read from the authorities cited in a dissenting opinion of Justice Clifford of

the Supreme Court of the United States in the case of *Wiggins vs. The People* (Tr. p. .)

Seventeenth. The court erred in giving the law as to the proof of motive in this case, and in stating that there is no adequate motive for the committing of a deliberate murder, and in saying:

"So, also, for the smallest plunders, murders have been deliberately executed. We have an illustration of this in the trial of Muller in England, in 1893, for the murder of Briggs. Briggs' watch was seen by Muller in a railway car. Briggs was asleep. The watch was exposed, and Muller killed Briggs by a sudden attack and succeeded in making his escape. He was afterwards arrested and convicted on circumstantial evidence, and before execution confessed the crime. Until the confession the justice of the conviction was largely criticised, on the ground that the stealing of the watch was not a motive that could explain a murder so bold, so cruel, and the chances of exposure so great." (Tr. p. .)

Eighteenth. The court erred in giving the law of manslaughter, and in saying:

"For the law says that the previous selection, preparation, and subsequent use of a deadly weapon shows that there was a purpose to kill contemplated before the affray existing, and whenever that exists, when it is done unlawfully and improperly, so that there is no law of self-defense in it, the fact that they have been in an actual affray with hands or fists would not reduce the grade of the crime to manslaughter." (Tr. p. .)

"It can not grow out of a state of case where there is a killing because of threats previously made, because of that which evidences special spite or grude or ill will, for if the killing is done on that ground, and if it is shown by the threats and the previous preparation of the defendant, or the fact of his arming himself and going back to the field where they were at work, and while there shot Charles Hermes to death, it cannot be evidence of that condition which could reduce the crime to manslaughter." (Tr. p. .)

And in not stating the law governing the state of facts set forth by defendant in his testimony, wherein defendant said in substance that he thought that possibly the deceased and his father and brother might offer him violence, and he armed himself for protection in case that they did so, and that his only practicable road home was the road which ran by the field where the killing occurred, and that he did not go that route for the purpose of having a difficulty.

And because the court gave numerous illustrations in giving the law of manslaughter, showing what would not reduce the killing to that grade of crime, and did not in like manner illustrate what state of facts would make a case of manslaughter.

Nineteenth. The court erred in giving the law of manslaughter, in stating that if defendant prepared himself and went to the place of killing he would be guilty of murder and not manslaughter, and in not giving the law governing the case where a man or person charged arms himself simply for the purpose of protection and in good faith goes to or by place of killing.

Twentieth. The court erred in charging the jury as to the age of defendant, and in expression "that you are not to be swayed from your purpose by any false sympathy;" and in saying:

"The proof in this case from the declarations of the defendant is that he is seventeen years old. The law holds a person of that age accountable for the crime of murder. The law says that every citizen is to be protected from acts of violence which destroy life, and it does not make any difference whether the person committing those acts of violence is seventeen years of age or seventy; they stand upon the same plane in that particular, and you are to determine this case upon this law and upon the evidence offered. You are neither to be swayed to the right or to the left by any false sympathy or any misconception of it." (Tr. p. .)

Twenty-first. The charge of the court was error, because it was prolix, confusing, abstract, argumentative, and misleading.

Twenty-second. It was error in the court to overrule defendant's motion for a new trial and to enter judgment against him and sentence him to death.

The first question that is raised by the assignment of errors is that of former jeopardy. The record shows that a jury was empanelled for the trial of this cause on the 23rd day of November, 1893; that the twelve men composing said jury were examined as to their qualifications prior to their being so empanelled; that after the witnesses had been sworn, the case

stated by the respective counsel, and one of the witnesses for the prosecution examined in chief, the court announced that it had been discovered since the trial began that Mr. Johnston, a member of the jury, had also been a member of the grand jury which indicted the defendant. The court then made an order discharging said jury from the further consideration of the case. The defendant excepted to the order discharging the jury, and after the discharging of the jury filed a plea of former jeopardy, and asking for the discharge of the prisoner.

Mr. Johnston, the incompetent juryman, was not asked upon his *viore dire* whether or not he had been a member of the grand jury that found the indictment. Had the question been asked, the true state of facts could have been ascertained by the district attorney, if not by his answer, by the records of the court. It can not be said that the true status of Mr. Johnston as a juryman in the case could not reasonably have been ascertained before he was empanelled. A list of the members of the grand jury which found the indictment should properly have been before the district attorney when examining the jurors as to their qualifications.

There is much conflict in the authorities as to what constitutes former jeopardy, and as to the right of a court to discharge a jury after it has been regularly empanelled. The case of *O'Brian vs. Commonwealth*, 9 (*Bush*) *Ky.*, 333, is a case very much, if not exactly, like the one at bar. There, the jury was empanelled and, after the evidence had been partly heard, one of the jurors announced that he had been a member of the

grand jury which indicted the defendant. Upon learning this fact, the court discharged the juror and had another one called and sworn and proceeded with the case. The Supreme Court of Kentucky, in reviewing the case, decided that by empanelling the first jury the defendant was placed in jeopardy, and was entitled to his discharge. In deciding the case, the Supreme Court used the following language:

"If a judge has the legal right to discharge the jury in a case like this, he may also discharge it on account of the absence of a witness for the prosecution, or in every instance, and as often as the testimony is deemed insufficient upon which to base a conviction, and subject the accused to the same mode of trial as pertains to every civil action."

It is a well settled rule in criminal procedure that after a jury has been empanelled it cannot be discharged until after verdict, except upon urgent necessity. Now, in this case, the judge and district attorney both stated that it would not be error to proceed with the case. (See printed record page 21.) If it was not error to proceed with the case, it was certainly error to discharge the jury and empanel a new one, no matter whether the defendant objected or consented, for the weight of authority is that in a capital case the defendant can not waive any right, or consent that his rights be taken away. As a matter of fact the defendant herein objected to the discharge of the jury, as shown by the record. There was much said by the court, the district attorney, and the counsel for the defense during the controversy, after the discovery that Mr.

Johnston was on the grand jury that indicted defendant, and the court put this direct question to attorneys for defendant:

"I want to know whether you object to proceeding or consent to proceeding."

The answer was:

"We simply object to the jury being discharged." (See printed record page 22—original record 87.) It would be unreasonable to say that in a case like this a defendant should lose his constitutional rights, because in a heated and exciting discussion, precipitated by the sudden discovery of the status of Mr. Johnston as a juryman, his attorneys should say too much or too little as to what course they were willing to pursue.

In any view of the case, the court should only have discharged Mr. Johnston, and called another juryman in his place. By the discharge of the entire jury, the defendant was deprived of the right to be tried by at least eleven competent jurymen from the regular panel of the term, whom he had selected, and upon the next trial was, among others, presented with twenty-eight talesmen whom the court had ordered summoned from the by-standers.

By the second assignment of error attention is called to the fact that the court, immediately after the discharge of the first jury empanelled for the trial of this cause, ordered the marshal to summon twenty-eight talesmen, from among the by-standers, for the purpose of obtaining another jury. It has been decided in several instances, by the Supreme Court of the

United States, that the act of congress of June 30, 1879, in regard to the manner of selecting juries, does not take away from a circuit or district court the right to order the marshal to summon talesmen from the by-standers to fill up the panel. But the motion for a jury from the body of the district was filed in this case. Because it was the opinion of the counsel for defendant that he would more likely receive fair consideration from a jury composed of men from different parts of the district, than from one made up of men who reside at the place where the court has been held for years, and who may have for this reason become too much accustomed to the trial, conviction and execution of criminals. It does not seem to be exactly the correct practice to present to an Indian boy charged with murder twenty-eight jurymen who live in any particular spot in the district where he is to be tried, but more particularly who reside within the shadow of the courthouse where his fate is to be decided. The list of jurors from which defendant was required to select upon his final trial, contained the names of thirty-three men who lived in Fort Smith, Arkansas, and twelve who lived in the other parts of the district. Of those who lived in Fort Smith five were of the regular panel and twenty-eight were summoned from the by-stanners. (See certified list of jurors, page 151 printed record.)

Section 802 of the Revised Statutes of the United States reads :

" Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most

favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such services."

Apparently, from this section, the law makers were first impressed with the importance of an impartial trial, and the punctuation of, and a proper construction of the language of the section shows that a proper consideration of this question was first to be had. It cannot be contended that the question of "expense" could be considered as long as there is the slightest probability of there not being an impartial trial. According to the section quoted, the citizens of one part of the district are not to be burdened with services as jurymen, but it is a fact well known that where a marshal is directed to summon as many as twenty-eight talesmen from the by-standers, he is likely to, and almost always does, secure many men who are anxious, and in waiting, to take upon themselves the burdens which the law says must not be imposed upon them. Certainly in this case, the defendant could not expect an impartial jury from this class of men.

The question raised by the third assignment of error is as follows:

After the first jury was discharged by reason of the status of Juror Johnston, the court ordered the clerk to call all the members of the regular panel to ascertain how many were qualified to act as jurymen in another trial of the case. The jurors were examined informally, it might be said, and it was discovered that the larger part of them had heard some part of

the testimony given before the first jury, and that they were disqualified as jurymen. Several of the jurymen were not present at the examination. The court then ordered the clerk to make out a new list including those of the regular panel who were not disqualified, which numbered seventeen, adding thereto the twenty eight talesmen summoned by the marshal, making forty-five in all, and deliver it to the marshal to be served upon defendant. This list, which is to be found upon page 251 of the printed record, was served upon defendant November 27, 1893. The service of this list was notice to the defendant that the names upon it, and those only, were to be presented to him from which he was to select the twelve men to try the case. The fact that seventeen of the regular panel were placed upon this list and were again served upon defendant, certainly precluded the idea that any other of the numbers of the regular panel were to be called. The certificate of the clerk attached to the list of jurors states, that it is "a true and correct list of jurors duly summoned and in attendance in the case of Thomas Thompson" (see printed record, page 152).

When the case was called for trial the second time, the clerk was directed to call all the names on the regular panel, notwithstanding the fact that they had been before examined informally and had disqualified themselves as jurymen in the presence of defendant, and were not on the list served on defendant. Of those jurymen called whose names were not on the list last served on defendant, three, viz., Wilson G. Gray, Wm. M. Perkins and Isaac B. Sloan were declared qualified by

the court and the defendant excepted. These jurymen had been presented to defendant when the first jury was made up and had been peremptorily challenged by him at that time. (See Mr. Sloan's examination, page 32 printed record) And they were the second time challenged peremptorily by defendant.

While it is true that these three jurymen were of the regular panel, and a list containing their names had been served on defendant at the beginning of the term, the action of the court in ordering a new list served on defendant, containing some of the regular panel, but not the three gentlemen named, was an abandonment of the former service and a direct notice to defendant that none, except those on the second list would be called. These same jurymen having been once peremptorily challenged by defendant, he would reasonably suppose that they might entertain some prejudice against him, for this reason. In short, the defendant should not have been required, in a case of this serious character, to be within one week twice presented with jurymen, whom he had, upon the first presentation felt called upon to reject.

The fourth assignment of error need not be discussed, as it relates to the failure of the court to sustain defendant's challenge to the twenty-eight talesmen summoned, which question has been fully reviewed.

The fifth assignment calls attention to certain language of the court and district attorney, during the examination of Dr. G. W. Bell by the government, in rebuttal, which was excepted

to by defendant. As is shown by the statement of the case herein, the defense contended that the deceased was not killed at the plow, but that he had started toward defendant and had gotten past the horse when he shot. And that afterwards the horse pulled the plow up near body of deceased. The defendant swore that the deceased had come a considerable distance towards him, at the time he shot (see his testimony printed record, pages 92, 93 and 99). There were many other circumstances in the case to corroborate defendant's statement as to this matter.

The district attorney labored to disprove it. When Dr. Bell came back upon the witness stand to give evidence upon this point, and after he had answered several questions, the court said to him: "How far did you say the body was from the plow?" To which Mr. Bell answered: "Right by the plow handles." The court then followed this answer by saying: "Right where a man would stand if he was hold of the handles?" (See printed record page 105.) The defendant excepted to the language of the court. It was clearly argumentative, and necessarily impressed the minds of the jury in such a way as to cause them to pay little regard to any proof the defendant had offered upon the question, and to make it useless for the attorneys for the defense to argue the proposition for which they had been contending—that the man was not killed while he was at the plow handles. After the court had made the declaration above set forth, the district attorney seemed to think it was his duty to take a hand in the fight, and he says

to witness: "In the position a man would be if he was holding to the handles, or about that position?" To which the witnes answered, "yes, sir." And the defendant excepted to the language of the district attorney, because it was leading and argumentative, but the exception was not sustained. (See printed record page 105)

We believe that the probable effect of the language of the court and district attorney, was to fix the minds of the jurymen, at that time, before they had heard the entire case, unalterably against the testimony of the defendant, and the corroborating circumstances as to where the deceased was when he was shot. There was little use for the defendant to have offered any testimony on the subject, or for his counsel to have discussed the question before the jury. The jury were the sole judges as to whether the defendant was testifying falsely or not, and the entire question should have been left to their unbiased decision.

The sixth and seventh assignments call attention to the language of the court in giving the facts and the law applicable to the plea of "former jeopardy." The charge does not leave it to the jury to say whether the plea is sustained after the law is given, but tells it in substance that upon that plea it is the duty of the jury to find against the defendant, the exact language being:

"Then I can state to you upon the facts as I have enumated them, your duty will be to find the issue raised by the special plea of 'former jeopardy' for the government."

The eighth error assigned is that the court delivered the charge orally. While there is no statute or rule requiring a

charge to be prepared and submitted to counsel before being delivered, there is every reason why this should be done. Our understanding is that this court refuses to consider any part of the charge to which exceptions are not properly taken. These exceptions must not be to the charge as a whole, but must designate the particular part of the charge excepted to. It is impossible when the charge is delivered orally for attorneys to take down the exact language to which they except, even with the assistance of the most skillful stenographer, for they cannot form any opinion as to what course they will pursue until a particular sentence, paragraph or section has been delivered, and then it is too late to get it. At best, when the charge is delivered orally, exceptions can only be saved to the law as given governing each particular element of the crime for which a defendant is being tried, as was done in this case without undertaking to give the exact language of the court.

Passing the ninth and tenth assignments we desire to call attention to the eleventh, wherein it is alleged that the court erred in giving the law as to malice aforethought. The charge of the court upon this element of the crime of murder, unquestionably shows great learning and research. It contains much that would be interesting and instructive were it delivered before a jury of lawyers whose minds are trained to receive and consider the intricate propositions that are there presented, but we do not believe that the meaning of the term "malice aforethought" was as clearly presented to the minds of the jury as it could have been, considering the ability of the men composing the jury.

Judge Sanborn of the Circuit Court of Appeals, in the case of *What Cheer Coal Company vs. Johnson, 56 Federal Reporter, page 814*, says:

"A short charge which clearly states the rule of law applicable to the issues, and sharply presents the questions of fact the jury are to determine, is desirable in every jury trial. Extended explanations of the reasons or purposes of the established rules that must govern the case, or arguments in their support, tend to confuse, rather than to assist a jury. The jury are governed by the law announced by the court, and the more clearly, simply and concisely it is presented to them, the more readily they understand, remember and follow it."

The charge of the court upon this element of the crime of murder is to be found from pages 115 to 122, inclusive, of the printed record. It certainly does not comply with the rule as set forth by Judge Sanborn. It abounds in reasons, arguments, and closely drawn distinctions, to such an extent as to make it practically unintelligable to the mind of the ordinary juror or to any other person not learned in the law. Doubtless the jurymen, in this case, remembered only a very small part of what was said upon the subject of malice aforethought. The part that they failed to remember, may have been as important as the portion retained. The former may have qualified the latter to such an extent as to change its meaning, and if such was the case, an injustice may have been done to the defendant. There are other matters contained in this part of charge, which are objectionable.

The learned judge, delivering the charge, says:

"Suppose that an innocent citizen is killed without just cause or legal provocation. What difference does it make to him how long the man has thought about it? What difference does it make to the community? The law says that premeditation may be a condition of the mind that springs into existence contemporaneous with the doing of the act, because if a man draws a deadly weapon and presents it at another, or even if he is drawing it in a violent way, the other need not stand still until he is shot down. And why? Because the other sees from the doing of the act, the drawing of the deadly weapon, an act of violence being executed, and he sees in that way a deadly purpose, and he can then and there act even to the extent of taking life of that other, if necessary to save his own life." (See printed record, page 118)

It is true that to create malice aforethought, premeditation does not have to exist for any considerable length of time, but as we understand the law, there must be some period of time for it to exist previous to the act. If this is true it is error to say that premeditation can spring into existence contemporaneous with the doing of the act. Contemporaneous means, "transpiring at the same time." According to this rule the act might begin before the premeditation sprang into existence, and if the latter should overtake the former before it was consumated, malice aforethoght would exist, and the party doing the act be guilty of murder. The latter part of the quotation from the charge above set forth, makes the question

of premeditation on the part of the assaulting party, dependant upon the state of mind of the party assaulted—upon the question as to whether the latter thought he had a right to defend himself or not. This is not a correct rule of law, as we understand it, for several reasons. The appearances might be deceptive so far as the assaulted party is concerned, he might believe that a deadly assault was being made upon him, when in fact no such intention existed. The right of self-defense does not depend upon the question of premeditation in the mind of the assaulting party. Nor is the converse of this proposition correct. This court, by Chief Justice Fuller, in case of *Hickory vs. United States, 151 U. S., 303*, says:

"In short whether or not a particular homicide is committed in repulsion of an attack, and if so, justifiably, are questions of fact, not necessarily dependant upon the duration, or quality of the reflection by which the act may have been preceeded. The gravest deliberation would not absolve under all circumstances, though it might mitigate the offense under some, and if the facts justified the act, the extent of deliberation would be immaterial."

The thirteenth assignment calls attention to the charge of the court as to the law of self-defense, and particularly to an extract read by the court from *Vaiden vs. Commonwealth, 12 Pratt, 717*.

The reading of this extract is objected to, because it gives the facts of that case and does not alone state the principles of law governing it. The facts were misleading when com-

pared with the facts in the case being tried, and had a tendency to confuse the minds of the jury.

The fourteenth assignment calls attention to the following extract from the charge of the court:

"The law of self-defense gives him the right to arm himself, for the purpose of defending himself, so long as he is in the right. But if he has a *conception* that deadly danger may come upon him, but he is away from it so he can avoid it, his duty is to stay away from it, and avoid it, because he has no right to go to the place where the slain person is, with a deadly weapon, for the purpose of provoking a difficulty or with the intent of having an affray." (See printed record, page 127.)

This extract is the concluding portion of the court's charge upon the law of self-defense, and the jury would for that reason remember it more clearly than anything that had gone before it. The latter part of it states the law correctly, but the word because, connects it with that which immediately preceeded it, which states that if a man has a *conception* that deadly danger *may come upon him*, and is away from it, his duty is to stay away, and that if he goes to the place or by the place with this conception in his mind, it is assumed that he was going there to prevoke a difficulty.

The defendant in this case stated that after he had passed the field on his way to perform his errand, and after he had the difficulty with deceased, his brother and father, he got to thinking about the matter, and that they had before made threats against him, and concluded that he had better arm himself in

order to make a defense, in case they assaulted him. That owing to the swamps in the neighborhood, he had no other way of going home, except by the field where the deceased was at work. That he did not intend to bring on a difficulty, but simply intended to defend himself in case of an attack. (See defendant's testimony, pages 97 and 98, printed record)

The defendant had a "conception that deadly danger might come upon him," but does a conception of this kind cut a man off from the right of self-defense, when he takes arms simply as a means of protection? If this were true, no man could arm himself in case he apprehended danger to his person. If he did so, no matter how violently he was assaulted, he could not plead self-defense in case he took life. The jury may have believed every word the defendant said as to his being unable to find any other way home. It should have done so, for his testimony, upon this point, was not contradicted. The jury may have believed what he said as to his reasons for arming himself, but yet under the charge of the court above quoted, he would have been found guilty—would have been cut off from the right of self-defense, no matter what occured at the time of the killing, for he had a conception that deadly danger might come upon him.

The charge of the court upon the effect of a defendant arming himself and going to the place of the difficulty, is open to serious objection, for the reason that it elaborates, and fully explains the circumstances which would cut a defendant off from the right of self-defense, but the only words uttered giv-

ing the law as to when a defendant would have a right to arm himself, are to be found in the beginning of the quotation, we have been discussing, wherein it is expressed, that:

"Of course the law of self-defense gives him the right to arm himself, for the purpose of defending himself, so long as he is in the right but if he has a conception, etc." The few words as to defendant's right are thrown in without any explanations or illustrations, and are followed by language which effectually destroys any benefit the defendant might have received from the stating of the principle.

The defendant excepted to the language of the court in charging the jury, as to the law governing threats, as set forth in the fourteenth assignment of error.

It is readily admitted that threats do not justify the taking of life, unless the party making them was, at the time of the killing doing some act indicating a design of carrying his threats into execution. But we think it was error in the court to charge, that if the jury found no act of this character, then it could only consider the threats to show the existence of special spite, or ill will or animosity upon the part of the defendant. The language is strong enough to have caused the jury to believe that it was their duty to consider the threats as showing special spite, etc. Threats might cause a feeling of this kind in the heart of a defendant, and they might not. It would, at least, require other proof than the bare threats themselves to show that this spite existed because of the threats. The court's language was misleading and had a strong tendency to injure the defendant.

The eightheenth assignment of error, calls attention to certain language of the court in giving the law of manslaughter. The extract from the charge upon this subject particularly excepted to, is as follows:

'For the law says that the previous selection, preparation and subsequent use of a deadly weapon, shows that there was a purpose to kill contemplated, before the affray existed, and whenever that exists, when it is done unlawfully and improperly, so that there is no self-defense in it, the fact that they have been in an actual affray with hands or fists, would not reduce the grade of the crime to manslaughter."

This language is in substance the same, and conveys identically the same idea as the language used by the same court in charging the jury, in the case of *John Gourko vs. United States, 153 U. S., 183.*

It declares that although a man may arm himself for the purpose of self-defense, yet if he kills under circumstances which do not make a case of self-defense, the previous arming and preparation, indicate premeditation, and cut the defendant off from a verdict of manslaughter, although the facts at the time of the killing would make a case of manslaughter. Mr. Justice Harlan in delivering the opinion of the court, in the Gourko case above referred to, says:

"Assuming, for the purposes of the present inquiry, that the defendant was not entitled to an acquital as having acted in self-defense, the vital question was as to the effect to be given to the fact that he armed himself with a deadly weapon after the angry meeting with Carbo in the vicinity of the postoffice.

If he armed himself for the purpose of pursuing his adversary, or with the intention of putting himself in the way of his adversary, so as to obtain an opportunity to kill him, then he was guilty of murder. But if, in view of what occured near the postoffice, the defendant had reasonable grounds to believe, and in fact believed, that the deceased intended to take his life, or to inflict upon him great bodily harm, and, so believing, armed himself solely for necessary self-defense in the event of his being pursued and attacked, and if the circumstances occuring on the occasion of the meeting at or near the saloon were such as, *by themselves*, made a case of manslaughter, then the defendant's arming himself, after the difficulty near the postoffice, did not have, in itself, the effect to convert his crime into that of murder. Stated in another form: Although the defendant may not have been justified on the occasion and under the particular circumstances of the difficuly at the billiard saloon in believing that the taking of his adversary's life was, then and there, necessary to save his own life or to protect himself from serious bodily harm; nevertheless, the jury were not authorized to find him guilty of murder because of his having deliberately armed himself, provided he rightfully so armed himself for purposes simply of self defense, and if, independently of the fact of arming himself, the case tested by what occurred on the occasion of the killing was one of manslaughter only.

The court, in effect, said—or the jury may, not unreasonably, have understood the court as declaring—that preparation,

by arming, although for self-defense only, could not be followed, in any case, by manslaughter, if, the killing, after such arming, was not, in fact, in necssary self-defense. Such we understand to be the meaning of the charge. In our opinion the court erred in so charging the jury. If the accused was justified in the eye of the law in arming himself for self-defense, and if without seeking but on meeting his adversary, or a subsequent occasion, he killed him, not in necessary self defense, then his crime was that of manslaughter or murder, as the circumstances, on the occasion of the killing, made it one or the other. If guilty of manslaughter, looking alone at those circumstances, he could not be found guilty of murder by reason of his having previously armed himself solely for self-defense."

The objection to the charge contained in the nineteenth assignment, refers to the fact that the court failed to give the law governing the case where a man armed himself for the purpose of self-defense, and no further comment upon that proposition is necessary.

The defendant excepted to certain language of the court which is set forth in the twentieth assignment. The extract from the charge objected to, is as follows:

"The proof in this case from the declarations of the defendant, is that he is seventeen years old. The law holds a person of that age accountable for the crime of murder. The law says that every citizen is to be protected from acts of violence which destroy life, and it does not make any difference whether the person committing those acts of violence is seven-

teen years of age or seventy. They stand upon the same plane in that particular, and you are to determine this case upon this law, and upon the evidence offered. You are neither to be swayed to the right or to the left by any false sympathy, or any misconception of it."

While the first part of the extract probably states the law correctly, yet we think it was unnecessary to give it in that way, and that its tendency was to fill the minds of the jurymen with the idea that there was no way in which the defendant could escape. The last sentence of the extract, we think, was misleading and had a tendency to prejudice the jury against the defendant. Nothing had been said about sympathy, false or true, and such a reference as this, by the court, would reasonably deter the jury from acquitting, even if they believed the evidence justified it, for fear it might be said that they did it through sympathy.

In the case of *Smith vs. State, 55 Ark., 259*, the trial court gave the following instruction:

"The court charges you that the jury has no right to pardon any one, for any offense, whatever, and if you are satisfied beyond a reasonable doubt that the defendant is guilty in manner and form as charged in the indictment, then it would be a gross violation of your duty, as sworn jurors, to acquit him through sympathy, or a spirit of condonation of his offense."

The supreme court in commenting on this instruction say:

"The court is constrained to express its disapproval of the twentieth instruction given on behalf of the state, without ex-

pressing an opinion as to the extent or effect of the error in giving it. Instructions are intended to enlighten the jury and guide them to correct legal conclusions upon the facts they shall find. There is no popular belief that the jury has the pardoning power, or that its usurpation would not be a gross violation of duty. To declare such a principle was wholly unnecessary, and an instruction couched in the language of this one is liable to be misconstrued and improperly influence the jury."

We think the comments of the supreme court of Arkansas will apply with equal force to the whole of the extract from the charge contained in the twentieth assignment of error.

Without further discussing the other assignments of error contained in the record, the foregoing is respectfully submitted.

A. H. GARLAND,

Attorney for Plaintiff in Error.

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CASE No. 15502.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THOMAS THOMPSON, PLAINTIFF IN error,
v.
THE UNITED STATES.
} No. 637.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error was indicted and convicted for the murder of one Charles Hermes at the Creek Nation, in the Indian Territory, on June 8, 1893.

STATEMENT OF FACTS.

This record is made up in the manner customarily adopted by the learned judge for the western district of Arkansas. "Considering the gravity and importance of

this case, it is ordered that the clerk of this court put the whole of the evidence and charge of the court in the bill of exceptions" (p. 8). It may be added that the learned judge has also inserted all the remarks of counsel and of himself in the course of the trial, both with relation to the particular facts of this case, and (p. 21) with relation to the administration of criminal justice in general.

There is only one exception, however, relating to the evidence, and that one is trivial. The exceptions to the charge relate entirely to the learned judge's discourse upon the familiar general features of willfulness, malice aforethought, self-defense, manslaughter, threats, etc.

Thomas Thompson, the defendant, went on the stand in his own behalf, and for the purposes of this argument we believe that a sufficient understanding of the case will be obtained by reading his own testimony at pages 90 to 102 of the record.

Thomas Thompson is an Indian boy and was 16 or 17 years old at the time of the killing. Charles Hermes, the boy whom he killed, was, at or just before the time of the fatal shot, plowing in a field near the roadside with his father and brother. Thompson testifies that, as he had been told, the Hermes family "had been threatening him; threatening to kill him." Their so-called threats to kill were as follows: They said "that he had been making fun of them, and going on acting the fool, and said if he did not quit it they would chop his head open with an ax." Thompson admitted that "he had laughed at the old man one time," but "he never had after they told him about what the old man had said, and he never made any more fun at him" (p. 96).

Some considerable time thereafter Thompson was riding by the field on the road when Charles Hermes "halted him" and talked. Thompson did not understand English, and only understood that they were saying something about hogs. "They said lots of things, but he did not know anything but hogs." He understood that the talk was in the nature of a threat, and got a loaded gun before he returned. "He was mad when he left them, but he did not think he would do anything because he had heard that the United States law was pretty hard, and he did not want to get into any trouble." * * * "He just took it for granted that they were saying he would steal their hogs, or something of the kind. * * * He got mad at this and got to studying over it, and, then, that the United States law was pretty hard and he would not make any attempt himself; but they had been talking of killing him and he thought it would be best to arm himself, and he went and got the gun" (p. 97). He might have ridden home across lots on his return, and thus avoided the Hermes family, but it was boggy in the prairie, so that it was an advantage for him to keep the road (p. 98).

As he came back he saw them plowing, and they got down to the end of the row before he passed, as his pony was a little lame. He claims that he saw a gun leaning up against the fence, and saw Charles Hermes leave the plow and start for the gun, making some remarks also about a gun. He admits, however, that he himself was only 6 feet from the fence, while the deceased was 30 feet from it and had gone only 15 feet from the plow (p. 99).

He thought that Hermes referred to the gun in the fence and not to defendant's own gun, because he did not think that the latter was visible to the Hermes family. "They said something about a gun, and one of them started toward the fence, and he looked and he seen the gun standing in the corner of the fence, and then he said that he knew they intended to kill him, and he just threw up his gun and fired and shot this Charley" (p. 92). He then rode off and tried to escape apprehension. His explanation why he shot before running away was that "if he had not shot and run he would have been in more danger and they would have shot him" (p. 101). This is difficult to understand, as he admits there were two other members of the Hermes family right at hand, and their gun was still left in the fence.

The Government's testimony was to the effect that the body of the murdered boy was found right at the plow handles.

ARGUMENT.

Former jeopardy.—After defendant was put on his trial, and while the first witness was being examined, it occurred to one of the jurors that he had sat on the grand jury which indicted the prisoner. He did not divulge the fact when the jury was impaneled, because he did not recognize the prisoner's name, but he recognized the first witness. The defendant's counsel not agreeing to waive this point, the court ordered the jury discharged and a second jury impaneled, which was accordingly done. Defendant assigns this as error (p. 150), but he refused to go on with the first jury, and stuck to a wholly unwar-

rantable claim that the court should direct a verdict of not guilty (pp. 8–10). The court allowed his attorneys, nevertheless, to file a plea of former jeopardy (p. 4), but at the conclusion of the trial charged the jury to find a verdict for the Government upon that plea (p. 112), having first given them the benefit of a very learned discussion on the authorities on the point (pp. 108–12). This course is made the basis for the sixth and seventh assignments of error (p. 153).

It is well settled that the court might have refused leave to file the plea altogether (*Simmons* v. *United States*, 142 U. S., 148; *Logan* v. *United States*, 144 U. S., 263, 297), and therefore he had the right to withdraw it from the consideration of the jury. *O'Brian's* case, relied on by the prisoner's counsel, was before the courts in the *Simmons* case (142 U. S., at p. 152).

Impaneling of talesmen.—Most of the regular jury panel being disqualified by the opinions they had formed during the prisoner's first trial, the judge summoned talesmen from the bystanders, and gave the prisoner two entire days' notice of the men so selected, in accordance with § 1033 of the Revised Statutes. That the right to summon talesmen still exists in Federal courts is decided in *Lovejoy* v. *United States* (128 U. S., 171) and *St. Clair* v. *United States* (154 U. S., 134, 147). The method to be pursued is a matter of discretion.

Alleged irregularity in jury lists furnished the prisoner.—§ 1033, above referred to, requires that the prisoner, at least two entire days before the trial, shall be furnished, among other things, with "*a list* of the jury." This prisoner before the first trial was furnished with such a list. After the first trial, and two entire days before the second trial, he was served with a second list containing 37 additional names. The second list does not seem to have contained any note to the effect that the first list also would be used by the court on the trial (pp. 13, 14). The prisoner's counsel insisted that this was a fatal irregularity, and that the court was debarred from using any of the names upon the first list served, which was to be regarded as superseded. The court overruled this claim, holding that there was no necessity that the entire list of jurors furnished should be on the same piece of paper, but that the prisoner might be served with any number of lists, provided that all were served 48 hours at least before the case was called for trial. Upon the merits of this ruling we desire to add nothing to the arguments inserted in the record by the learned judge himself (pp. 145–6). So far as not expressly restricted by statute, and so far as not unfair to the prisoner, the method of impaneling jurors is in the discretion of the trial court. (*Pointer* v. *United States*, 151 U. S., 396, 411; *St. Clair* v. *United States*, 154 U. S., 134, 148.)

It is unnecessary, however, to consider this claim, for the record shows that the ruling, even if erroneous, could not possibly have prejudiced the prisoner.

The prisoner in a capital case is allowed twenty peremptory challenges (Rev. Stat., § 819). The three jury-

men (Messrs. Gray, Perkins, and Sloan), accepted by the court from the first list, notwithstanding defendant's challenge for cause, were all peremptorily challenged by the defendant, their names not appearing upon the jury which tried the case and found the verdict against him (p. 5). Now, if these three peremptory challenges had tended to exhaust his challenging power, defendant would have had standing to argue that his challenges for cause were erroneously overruled. If, however, the circumstances were such that he did not desire to use up his twenty peremptory challenges in any other manner, it is merely trifling to claim now that he was prejudiced. (*Hayes* v. *Missouri*, 120 U. S., 68, 71; *Hopt* v. *Utah*, *id.*, 430, 436; *State* v. *Hoyt*, 47 Conn., 518; *Sullings* v. *Shakespeare*, 46 Mich., 408; *State* v. *Lawlor*, 28 Minn., 216; *Minich* v. *People*, 8 Col., 440.) It remains to inquire, therefore, whether defendant did or did not need for other purposes the three peremptory challenges which he used for the purpose of excluding these three candidates from the first list.

The proceedings upon impaneling the jury are set forth quite at length at pages 27 to 35 of the record, the extracts closing with the following words: "The above and foregoing contains a record of proceedings as to that part of the selection of jurors which was objected to by the defendant. Where jurors were not objected to for cause, or otherwise, their examination does not appear." It appears from these extracts, as might be inferred from the language of the assignment of error, that Messrs. Gray, Perkins, and Sloan were the only gentlemen on the first list who were held by the court to be qualified as jurors upon

the second trial. The others were all shut out as having formed opinions, and the names of the jurymen who actually sat on the second trial and found the verdict of guilty (p. 5) all appear on the second list furnished the prisoner (pp. 151, 152).

This second list commences with 17 names taken from the original panel of jurymen and ends with 28 names of talesmen. Of the first 17 gentlemen, 7 (Messrs. Nail, Smith, Eubanks, Goodwin, Lively, Morris, and Oliver) actually sat upon the jury. Four (Messrs. Weaver, W. C. Harrison, Spoon, and Simpson) were disqualified or excused by the court (pp. 28, 32, 33, 34). This leaves 6 only out of the first 17 names. Out of the original jury panel defendant can not have challenged peremptorily more than 9 men, namely, these 6 and the 3 whose names were presented to him from the first list. We now come to the talesmen. It appears from page 15 of the record that the clerk called 13 talesmen in all, of whom "the defendant * * * *accepted*" 6. He can not, therefore, have objected to more than 7, and his peremptory challenges can not have exceeded 16 in all, if, indeed, they reached that number. Having 4 peremptory challenges to spare when he accepted the jury he was not in any way prejudiced by having had to expend 3 of his 16 upon the 3 gentlemen whose cases he now complains of.

Exception to leading questions.—Upon this we have nothing to add to the remarks of the court at page 146.

Exceptions to charge.—The assignments of error at pages 154 to 157 would apparently indicate that quite definite exceptions were taken to the charge of the court. The exceptions themselves, however, appear at pages 135, 136, and are in main very vague and not such as could in any degree call the court's attention to the matters really complained of. Counsel complains that he could not particularize because he had had no copy of the charge to study and mark; but it was unnecessary to quote its exact language in excepting. He could state in his exception the proposition of law objected to, without the aid of a stenographer. As omissions to except can not be cured by an assignment of errors (*Tucker* v. *United States*, 151 U. S., 164, 170), and as general exceptions to a charge which do not direct the attention of the court to the particular portions of it to which objection is made raise no question for the jury (*Holder* v. *United States*, 150 U. S., 91, 92, and cases cited; *Bogk* v. *Gassert*, 149 U. S., 17, 25–6; *Connecticut Mutual Life Insurance Co.* v. *Union Trust Co.*, 112 U. S., 250, 260–1; *Carver* v. *Astor*, 4 Pet., 1, 81; *Harvey* v. *Tyler*, 2 Wall., 328, 339), most of the particularizations in the assignment of errors are not available to the plaintiff in error.

The matters excepted to are in general merely amplifications in general language of most elementary principles of law. Failure on the court's part to "elaborate the law" upon any point can not be complained of when the prisoner's counsel did not by requests for instructions indicate the nature of the desired elaboration (*Texas and Pacific Railway* v. *Valk*, 151 U. S., 73, 79), at least when the excep-

tion is not in such form as to make it equivalent to a request to charge. (*Hickory* v. *United States*, 151 U. S., 303, 317.) The prisoner complains because the court embellished the charge with illustrations drawn from the cases of Muller and Briggs and others; but this complaint is disposed of by *Pointer* v. *United States* (151 U. S., 396, 416). Referring to the general exception to the whole charge, it is not necessary to consider here whether the charge is "prolix, confusing, abstract, argumentative, and misleading" (p. 136), for substantially the same objection was taken to a charge equally objectionable in *Pointer* v. *United States*, *supra* (see Record in that case), and considered by this court to be "without merit." (151 U. S., at p. 420.) The remedy in such a case is by motion for a new trial; and from such a motion no appeal lies to this court. (*Holder* v. *United States*, 150 U. S., 91, 92; *Blitz* v. *United States*, 153 U. S., 308, 312.) The same comment may be made upon the objection that the court tended to confuse the minds of the jurymen by giving too many definitions of "malice aforethought."

The only exceptions which present definite objections to any portion of the charge are the tenth, thirteenth, and nineteenth.

The tenth exception (p. 135, foot) apparently refers to the last paragraph on page 120 and the passage at the top of page 122, these passages saying in effect that malice is to be inferred from the use of a deadly weapon, not in self-defense and without mitigating circumstances. This is the court's way of stating the principle of the *York* case, as approved in *Pointer* v. *United States* (151 U. S., 396, 414.)

The thirteenth and nineteenth exceptions (p. 136) substantially credit the court with charging the jury that defendant was shut out from the right to claim self-defense under any circumstances if he armed himself before returning to the place of killing; in other words, with substantially repeating his charge in the *Gourko* case, (153 U. S., 183).

The question left by the court with the jury was whether the prisoner "went off and armed himself *for the purpose of making an attack* upon Hermes, or any of the party whom the Government offered as witnesses" (p. 127); or "for the purpose of provoking a difficulty or with the intent of having an affray" (p. 127). The prisoner's own testimony showed no justification for shooting in self-defense, and the most he could claim, if anything, was a verdict of manslaughter.

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